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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NONPARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

Now come the plaintiffs, Hazel Park Nonpartisan Taxpayers Association, and John G. Campbell and the cross-plaintiffs, City of Pleasant Ridge and City of Huntington Woods, being cross-appellants in the said cause, and in support of their petition for appeal, submit this jurisdictional statement in accordance with United States Supreme Court Rule No. 12.

Jurisdiction of the United States Supreme Court

The Supreme Court of the United States has jurisdiction upon appeal to review the decree of the Supreme Court of the State of Michigan filed and entered on the 24th day of

June, 1947, in pursuance of decision reported in 317 Mich. 607, as follows:

Subsection (a) of Sec. 237 of the Judicial Code as amended by Act of January 31, 1928 ((R. S. 690, 709) March 3, 1911 as amended, January 31, 1928, C. 14 Sec. 1, 45 Statutes 54) provides for such jurisdiction, as an appeal from:

> "A final decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, . . ."

Decisions Sustaining Jurisdiction

The following decisions of this Court sustain jurisdiction of this appeal:

Miller v. *Schoene* (Va. 1928) 48 S. Ct. 246, 276 U. S. 272, 72 Fed. 568;

Citizens Savings & Loan Association v. *City of Topeka,* 87 U. S. 655, 22 L. Ed. 455;

Village of Norwood v. *Ellen R. Baker,* 43 L. Ed. 443, 172 U. S. 269;

Myles Salt Co. v. *Board of Commissioners,* 60 L. Ed. 392, 239 U. S. 478;

Road Improvement District v. *Missouri Pacific Ry. Co.,* 71 L. Ed. 992, 274 U. S. 188.

State Statutes Involved as to Constitutionality

The statutes, the validity of which are involved are:

Act No. 116 of the Public Acts of Michigan, 1923, more particularly amended by Act No. 58 of the Public Acts of Michigan 1927;

". . . If any such special assessment fund is insufficient to pay such bonds and interest thereon when

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due, *the township board shall advance the amount necessary to pay such bonds,* and shall be reimbursed from such assessments when collected, or by reassessment of the deficiency if necessary." (italics ours.)

Act No. 13, Sec. 4, subdivision (k) erroneously stated (i) of the Public Acts of Michigan 1932 (1st Ex. Sess.) as amended and retained in Act 271 of 1937, Sec. 4, subdivision (d);

"All refunding bonds issued under the provisions hereof, except those issued to refund drainage bonds issued under the terms of act number three hundred sixteen (316) of the public acts for the year nineteen hundred twenty-three (1923), as amended, shall, unless otherwise provided in such refunding bonds, *be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof.*" (italics ours.)

Decree Appealed and Date Thereof

The decree of the Supreme Court of the State of Michigan sought to be reviewed was signed, dated and filed on the 24th day of June, 1947 and this application for appeal was presented on the 4th day of September, 1947.

Nature of Case and Ruling Below

This is a Class Suit brought under equitable jurisdiction of the Circuit Court for Oakland County, Michigan, in Chancery, to determine the validity of, and liability upon, certain Special Assessment Bonds issued by various Special Assessment Local Improvement Districts of Royal Oak Township, a defendant.

These Special Assessment Local Improvement Districts were established for the construction of local sewer and water lines and they assessed the full cost of the improvements against properties in the districts according to benefits. No portion of any of the cost was assessed to the Township of Royal Oak, or any other unit of government.

The Local Improvement Districts remain in Royal Oak Township, except for portions thereof which have now become parts of other cities, namely: Ferndale, Royal Oak and Hazel Park.

The Special Assessment Bonds in question were issued in 1926, prior to the enactment of the aforementioned statutes, *and were payable solely from special assessment collections, and not by general township tax or liability.* After the bonds were defaulted, through failure of the local improvement district tax collections, the Acts, constitutionally questioned, were held to create, retroactively, liability upon *unbenefited* properties and cities. Plaintiff, Hazel Park Nonpartisan Taxpayers and John G. Campbell represent Taxpayers as a Class owning property lying outside the Special Assessment Districts, who by virtue of the above statutes will be required to pay the defaulted bonds under the ruling of the Michigan Supreme Court.

Appellant Cities of Pleasant Ridge and Huntington Woods were incorporated out of territory of Royal Oak Township in 1928 and 1932 respectively, taking no territory from any of the Special Assessment Districts, nor were they benefited by any of the Special Assessment Projects in question. No portion of the cost of the local improvements was assessed against them or properties now within their boundaries.

Substantial Question Involved

By virtue of said statutes and the opinion and said Decree of the Michigan Supreme Court all appellants as a Class will be obligated to pay in excess of $300,000 of such bonds, and a substantial question is thus involved.

Constitution Question Raised

The Acts complained of impose upon appellants, taxation and obligations for which they receive no benefit and the

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payment of which serves no public purpose and enures entirely for the benefit of private individuals. This violates Article V and Article XIV, Sec. 1, of the Amendments in the Constitution of the United States.

Constitution Question Saved for Review

These constitutional questions were seasonably raised by appellants in the Pleadings, on trial in the Circuit Court, by Assignment of Error and Reasons and Grounds for Appeal, and in appropriate briefs and arguments, before the Supreme Court of the State of Michigan, and in all instances appellants' contentions were over-ruled, being expressly passed upon in the opinions and decrees of both the Circuit Court and the Supreme Court of Michigan. Appellants pleadings prayed: (See Record, Michigan Supreme Court pp. 114-117):

> "That this Court may decree that Act 58 of 1927, Act 26 of 1931 and Act 271 of 1937 are invalid and inoperative as to bonds issued prior thereto for the reasons that these statutes if retrospective in scope, or applicable to then outstanding bonds . . . deny municipalities and the tax-payers thereof due process of law and equal protection of the laws and impair the obligation of contract contrary to the provisions of Article I, Sec. 10, Paragraph 1 of the Constitution and Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States of America. . . ."

The Opinion of the Supreme Court of Michigan stated:

> "It is the contention of the city of Pleasant Ridge and the city of Huntington Woods, cross-defendants, that (1) inasmuch as no possibility exists for reimbursement of a general fund through subsequent collections of special assessments, the 1927 amendment imposing a liability on the township to pay out of its general fund is unconstitutional, both as to bonds, theretofore and thereafter issued. . . . Neither do we find

any merit in appellant's contention that the above-quoted provision in Act No. 58, Public Acts 1927, must be held unconstitutional if applied to special assessment bonds issued prior to the effective date thereof, in that it would constitute the taking of property (of the appellant city) without due process of law. . . . In furtherance of its claim that said Act No. 58, Pub. Acts 1927, is unconstitutional in that it takes property without due process of law, appellant contends that said act authorizes the levying of a tax for a private purpose, i.e., to pay bondholders . . . Appellant contends that the proposed tax would have no purpose other than the relief of bondholders, citing cases which have held such levies unconstitutional for that reason. . . . We agree with the trial court that said act is not unconstitutional on the grounds urged. . . ."

Attached hereto are true copies of the Opinion and Decree of the Supreme Court of the State of Michigan.

STANTON G. DONDERO,
Attorney for Hazel Park Nonpartisan Taxpayers Association and John G. Campbell, Plaintiffs and Appellants and Cities of Pleasant Ridge and Huntington Woods, Cross-plaintiffs and Appellants. Business Address: 521 Washington Square Building, Royal Oak, Michigan;
ARTHUR E. MOORE,
Of Counsel,
Same Address.

Dated: August 29, 1947.

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APPENDIX "A"

STATE OF MICHIGAN

SUPREME COURT

Appeal from the Circuit Court for the County of Oakland, in Chancery Honorable Frank L. Doty, Circuit Judge

Circuit No. 21,917

Supreme Court No. 43,479

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION and JOHN G. CAMPBELL, Plaintiffs and Appellees,

v.

TOWNSHIP OF ROYAL OAK, *Defendant and Cross-Plaintiff, and Appellee;* MUNICIPAL FINANCE COMMISSION (Formerly Public Debt Commission), EDGAR B. WHITCOMB and ANNA S. WHITCOMB, CITY OF HIGHLAND PARK and VILLAGE OF OAK PARK, *Intervening Defendants and Appellees;* CITY OF FERNDALE, *Cross-Defendant and Appellant;* CITY OF PLEASANT RIDGE, and CITY OF HUNTINGTON WOODS, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY, *Cross-Defendants and Cross Appellants;* CITY OF HAZEL PARK, *Cross-Defendant and Appellee*

DECREE

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room in the Capitol in the City of Lansing, on the 24 day of June, 1947:

Present the Honorable Leland W. Carr, Chief Justice; Henry M. Butzel, George E. Bushnell, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, Walter H. North and John R. Dethmers, Associate Justices.

This cause having come on to be heard, and having been duly argued by counsel for the respective parties, and having been duly considered by the court having filed a written opinion herein, and it appearing to the court that the decree

of the circuit court for the County of Oakland, in Chancery, heretofore entered in said cause, except as the same is hereinafter modified, should be affirmed.

It is therefore ordered, adjudged and decreed:

1. Liability of defendant, Township of Royal Oak, on bonds.

a. Special assessment bonds issued.

Because the Township of Royal Oak, Oakland County, Michigan issued the following Special Assessment Bonds in anticipation of the collection of special assessments in each of the Special Assessment Districts Nos. 5 to 11, 12 to 18, 22 to 25 and 27 to 35, all inclusive, for the installation of water mains, sewers and street improvements, which bonds were issued and sold in groups as follows:

Bonds re S. A. Dist. Nos.	Date of Bonds	Date of Delivery of Bonds to Purchaser	Aggregate Amount of Bonds
5 to 11 incl.	Oct. 1, 1926	Oct. 11, 1926	$342,500.00
12 to 18 incl.	Aug. 15, 1927	Aug. 19, 1927	88,750.00
22 to 25 incl.	April 1, 1928	April 7, 1928	74,500.00
27 to 34 incl.	July 1, 1928	Aug. 15, 1928	89,000.00
35	Sept. 1, 1928	Sept. 26, 1928	37,000.00
			$631,750.00

the unpaid balances of which formed the basis of the Refunding Bonds of the township involved in this action, the Township of Royal Oak, as of the aforementioned respective dates of delivery of such bonds to the purchasers, by force of law, was placed in the position of a guarantor, obligated to advance from its general funds sufficient money for the prompt payment of all principal and interest due thereon if at any time the funds derived from the collection of special assessment taxes from the rolls in said Special Assessment Districts were insufficient to make such payments, which contingent liability continued until the obligation of such bonds was fully satisfied.

b. Statutory provisions concerning Special Assessment Bonds.

The bonds issued in Districts Nos. 5 to 11, both inclusive, in the principal amount of $342,500.00, were issued under

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the provisions of Act No. 116 Public Acts 1923, as amended by Act No. 263 Public Acts 1925. The bonds issued in Districts Nos. 12 to 18, 22 to 25, 27 to 34 and 35, all inclusive, were issued under said Act No. 116, Public Acts of 1923, as so amended and as further amended by Act No. 58 Public Acts 1927, effective April 21, 1927 (Sec's. 2385-2388 C. L. '29) which latter act added to Section 3 thereof the following sentence:

> "If any such special assessment fund is insufficient to pay such bonds and interest thereon when due, the township board shall advance the amount necessary to pay such bonds, and shall be reimbursed from such assessments when collected, or by reassessment of the deficiency if necessary."

c. Township liability upon Special Assessment Bonds.

The foregoing provisions of the statutes, as construed by the decisions of the Supreme Court, created a contingent liability against defendant, Township of Royal Oak, at large, not only as to bonds issued after April 21, 1927, but also as to Special Assessment bonds in Districts Nos. 5 to 11, both inclusive, issued prior to said date, and said defendant was obligated to advance from its general funds sufficient money for the prompt payment of all principal and interest due upon said Special Assessment bonds, if, at any time the funds derived from the collection of Special Assessment taxes in said special assessment districts were insufficient to make such payments, which contingent liability continued until the obligations on such bonds were fully satisfied.

d. Township liability on Refunding Bonds.

In the years 1938 and 1939, defendant Township of Royal Oak, pursuant to the provisions of Act No. 13, Public Acts 1932 (First Extra Session), as amended by Act No. 143, Pub. Acts 1933, Act No. 42 Pub. Acts 1935 and Act No. 98 and Act No. 271, Pub. Acts 1937 (Sec's. 5.3201-19 Mich. Stat. Ann.) issued callable refunding bonds, dated October 1, 1936 and payable October 1, 1966, for the purpose of refunding the principal of such of the aforesaid Special Assessment Bonds as was then unpaid, and issued callable

certificates of indebtedness, dated October 1, 1937 and payable October 1, 1947, for the purpose of refunding the unpaid interest on such Special Assessment Bonds. The series and amounts of said refunding bonds and certificates of indebtedness, divided as to bonds bearing different issuance dates, are as follows:

Refunding Obligations	Obligations Refunded		Principal Amount Refunding Obligations Issued
Ser. A Ref. Bonds	Part of Principal of Districts 5/11 bonds		$45,600.00
Ser. B Ref. Bonds	Part of Principal of Districts 5/11 bonds		160,500.00
Ser. C Ref. Bonds	Principal of Districts 12/18 bonds	$30,175.00	
Ser. C Ref. Bonds	Principal of Districts 22/25 bonds	16,900.00	
Ser. C Ref. Bonds	Principal of Districts 27/34 bonds	24,500.00	
Ser. C Ref. Bonds	Principal of District 35 bonds	25,650.00	97,225.00
	Total Refunding Bonds Issued		$303,325.00
Certificates of Indebtedness	Interest on Districts 5/11 bonds		66,136.35
Certificates of Indebtedness	Interest on Districts 12/18 bonds		9,303.89
Certificates of Indebtedness	Interest on Districts 22/25 bonds		3,132.45
Certificates of Indebtedness	Interest on Districts 27/34 bonds		5,806.25
Certificates of Indebtedness	Interest on District 35 bonds		5,877.57
	Total Certificates of Indebtedness Issued		$ 90,256.51

The following original bonds which were authorized to be refunded were retired prior to exchange of bonds to-wit:

District No. 13	$4,000.00
District No. 15	500.00
District No. 17	500.00
1931 Ref. Bonds, Ser. A	8,000.00

and the following amounts were paid in cash on original bonds, to-wit:

Districts 5/11	225.93
District 22	2.50

At the time of the issuance of said refunding obligations, defendant Township was in default in the payment of principal in the aggregate principal amount of $303,325.00, and, in the payment of accrued interest in the amount of $90,263.26, and had, no, or, insufficient, funds derived from

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collections on special assessment taxes from the rolls in said special assessment districts out of which to pay the same, and, it thereupon became and was the duty of defendant, Township of Royal Oak, to discharge its contingent liability thereon by the issuance of said Refunding Bonds and Certificates of Indebtedness to refund such liability, and said Refunding Bonds and Certificates of Indebtedness are valid and enforceable general obligations of defendant, Township of Royal Oak.

2. Statutes under which bonds were issued are not unconstitutional.

The provisions of Act No. 58, Public Acts 1927 (Sec's. 2385-88 C. L. '29), requiring the Township Board to advance moneys to pay principal and interest on bonds, which was both retrospective as well as prospective in effect, as applied to bonds issued prior to the effective date of said act, was not unconstitutional as authorizing the levy of a tax for a private purpose and did not constitute the taking of property without due process of law in violation of Section 16, Article 11 of the Michigan Constitution and Articles V and XIV, Section 1, of Amendments to the United States Constitution. The provisions of subdivision k, section 4 of Act No. 13, Public Acts 1932 (First Extra Session), as amended, providing that "all refunding bonds issued under the provisions thereof, except . . . (exception not here applicable) shall unless otherwise provided in such refunding bonds, be the general obligation of the issuing municipality and the full faith and credit of the same shall be pledged to the payment thereof," as applied to the refunding bonds, was not unconstitutional as authorizing the levy of a tax for a private purpose and would not constitute the taking of property without due process of law in violation of Section 16, Article 11 of the Michigan Constitution, and Articles V and XIV, Section 1, of Amendments to the United States Constitution. Act No. 116, Public Acts 1923, as amended by Act No. 263, Public Acts 1925 and Act No. 58, Public Acts 1927 (Sec's. 2385-88 C. L. '29), and Act No. 13, Public Acts 1932 (First Extra Session), ((Sec's. 5.3201-5.3219 Stat. Ann.) (Subsequently repealed

by Act No. 202 Public Acts 1943, with saving clause, being Sec's. 5.3188(1)-(49) (Stat. Ann.)) are constitutional.

3. Liability of incorporating or annexing municipality where incorporated or annexed territory did not include any part of any special assessment district.

Cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, which incorporated or annexed portions of the territory of defendant, Township of Royal Oak, are liable to defendant, Township of Royal Oak, as herein provided, notwithstanding that some portions of such territory so incorporated or annexed were not included in any of the special assessment districts.

4. Township not required to submit question of issuance of bonds to electors.

Defendant, Township of Royal Oak, under the laws of the State of Michigan, was not required to submit the question of the issuance of the Special Assessment Bonds or the Refunding Bonds to a vote of the electors of the township.

5. Date of creation of contingent liability of defendant and cross-defendants on Special Assessment Bonds.

The contingent liability of defendant Township of Royal Oak on the Special Assessment Bonds which form the basis of this action was created on the respective dates of the delivery of such bonds to the purchasers as hereinbefore set forth in paragraph 1a. hereof, and each of the cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, upon incorporation or annexation of a portion of the Township territory at any time thereafter, became liable for its proportionate share of such contingent liability which existed at the time of such incorporation or annexation.

6. Settlement agreements did not constitute accord and satisfaction.

The various settlement agreements between the Township of Royal Oak and the several cross-defendant municipali-

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ties, which incorporated or annexed portions of township territory, did not constitute accord and satisfaction as to the contingent liability of the Township of Royal Oak and such municipalities on the Special Assessment Bonds and Refunding Bonds.

7. Valuation of township where there are successive annexations during any one year.

The value of the taxable property of the township, as shown by the total assessed valuation of all property in the Township by the current assessment rolls, less any deductions therefrom because of prior incorporation or annexation of township territory during such year, must be used for the purpose of determining the proper division of assets and liabilities of the township upon any subsequent incorporation or annexation of township territory during such year.

8. Effect of township's failure to levy additional special assessment taxes.

The failure of the township to levy additional special assessment taxes for the purpose of paying the Special Assessment bonds did not relieve cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, from their proportionate liability for the payment of such bonds as hereinbefore decreed. Provided, however, this decree is without prejudice to the rights of any parties hereto, relative to the alleged duty to levy reassessments (or additional pro-rata assessments) to cover deficiencies in the collection of assessments in the various special assessment districts.

9. Liability of Municipalities on Refunding Bonds.

Cross-defendants, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson are liable, respectively, for the payment to the defendant, Township of Royal Oak, of those portions of principal and interest on the Special Assessment Bonds and the Refunding Bonds and Certificates of Indebtedness heretofore paid by the defendant, Township of Royal Oak out of funds derived by

it other than from collections of special assessment taxes from the rolls in said Special Assessment Districts, and for contribution to the payment of those portions of principal and interest on the Refunding Bonds and Certificates of Indebtedness remaining unpaid, such liability to be determined according to the percentage of the assessed valuation of the taxable property of portion of Township territory incorporated or annexed by each such municipality, at the time of each such incorporation or annexation, to the total assessed valuation of the taxable property in the Township immediately before such incorporation or annexation. The schedule attached hereto as Exhibit A and made a part hereof, sets forth the essential information together with the dates of delivery of such bonds set forth in paragraph 1a. hereof, to be used in determining such liability:

10. Accounting.

An accounting shall be had under the direction of the Circuit Court for the County of Oakland, in Chancery, between defendant Township and cross-defendant cities to determine the total amount heretofore derived by the Township from collections of special assessment taxes from the rolls in such Special Assessment Districts, the total amount of principal and interest heretofore paid by the Township for principal and interest on said Special Assessment Bonds and on said Refunding Bonds and Certificates of Indebtedness, the amounts which the respective cross-defendants are liable to pay to the Township by reason of amounts of principal and interest heretofore paid by the Township for principal and interest on said Special Assessment Bonds and on said Refunding Bonds and Certificates of Indebtedness from funds other than those derived from collections of special assessment taxes from rolls in said Special Assessment Districts, and the amounts which the respective cross-defendants are liable to contribute by reason of amounts of principal and interest which remain unpaid on said Refunding Bonds and Certificates of Indebtedness.

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11. Method of Payment.

Cross-defendant municipalities, City of Ferndale, City of Royal Oak, City of Hazel Park, City of Pleasant Ridge, City of Berkley, City of Huntington Woods and City of Clawson, for the year 1947, or in the first year following the entry of a decree in said accounting, unless a longer period be granted by the said circuit court in chancery, shall raise a sufficient amount to repay defendant township for any sums found due it on the accounting decreed in the foregoing paragraph hereof, and, at the close of the tax collection period, shall pay the same to defendant township. Defendant township and cross-defendant municipalities shall, each year after the entry of this decree, raise a sufficient amount to pay their respective shares of all principal and interest during such year on said Refunding Bonds and Certificates of Indebtedness less any receipts from special assessment taxes, and cross-defendants shall, at the close of each tax collection period, pay the same to defendant Township, or by depositing the same with the paying agent hereafter designated by the said circuit court in chancery, to be deposited in a special account for the payment of principal and interest on said bonds.

12. Retention of jurisdiction.

Jurisdiction over all of the matters herein involved shall be retained by the Circuit Court for the County of Oakland, in Chancery, for the purpose of determining all questions which may arise in connection with the execution and carrying into effect of the terms and provisions hereof upon completion of the accounting hereinbefore directed, and, for the further purpose of determining the compensation which should be allowed to counsel for the intervening defendants, Edgar B. Whitcomb and Anna S. Whitcomb and the City of Highland Park, acting in behalf of all holders of Refunding Bonds, Series A, B and C, and Certificates of Indebtedness, issued in connection therewith, from amounts which are to be paid by the defendant Township of Royal Oak and the cross-defendant Cities to the holders of such Refunding Bonds and Certificates of Indebtedness, and leave is hereby granted to any of the parties hereto to

make application to said court at any time for such orders or directions as may be necessary or proper in relation thereto.

All injunctions heretofore issued in connection with proceedings in this cause may be, and, the same hereby are dissolved.

Inasmuch as questions of a public nature are involved no costs will be taxed.

—— ——.

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EXHIBIT A

Name of Incorp. (I) or Annexing (A) Municipality		Date of Filing Election Results with Secretary of State	Assessed Valuation of Territory Taken	Assessed Valuation of Territory immediately before Separations	Valuation Based on Assessment Roll for Year of	Liability of Municipality		Refunded by Refunding Sinking Fund Bonds-Series
						Percentage of Liability %	On Bonds re Roll Numbers:	
1. Ferndale	(I)	1-29-37	$14,457,780	$53,145,995	1926	27.2039	5-11 Inc.	
2. Royal Oak	(A)2	4-25-27	2,393,580	38,688,215	1926	6.1868	5-11 Inc.	
3. Ferndale	(A)	8-23-27	806,550	38,945,060	1927	2.0710	5-11 Inc. 12-18 Inc.	
4. Pleasant Ridge	(I)	1- 3-28	3,982,465	38,138,510	1927	10.4421	5-11 Inc. 12-18 Inc.	
5. Ferndale	(A)	3- 3-28	985,200	34,156,045	1927	2.8844	5-11 Inc. 12-18 Inc.	
6. Ferndale	(A)	6-11-28	1,499,046	33,453,689	1928	4.4810	5-11 Inc. 12-18 Inc. 22-25 Inc.	
7. Royal Oak	(A)	4-16-29	244,572	31,954,643	1928	.7654	5-11 Inc. 12-18 Inc. 22-25 Inc. 27-34 Inc. 35	
8. Royal Oak	(A)	9-14-29	2,170,745	31,482,285	1929	6.8951	5-11 Inc. 12-18 Inc. 22-25 Inc. 27-34 Inc. 35 Inc.	
9. Berkley	(I)	4-18-32	4,955,925	27,954,468	1931	17.7286	5-11 Inc. 12-18 Inc. 22-25 Inc. 27-34 Inc. 35	
10. Huntington Woods	(I)	6-22-32	$2,792,095	$17,740,413	1932	15.7386	5-11 Inc. 12-18 Inc. 22-25 Inc. 27-34 Inc. 35	

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EXHIBIT A

Name of Incorp. (I) or Annexing (A) Municipality		Date of Filing Election Results with Secretary of State	Assessed Valuation of Territory Taken	Assessed Valuation of Territory immediately before Separations	Valuation Based on Assessment Roll for Year of	Liability of Municipality		Refunded by Refunding Sinking Fund Bonds-Series
						Percentage of Liability %	On Bonds re Roll Numbers:	
11. Clawson	(1)	6-13-40	905,975	12,604,270	1939	7.1878	5-11 Inc.	A
							5-11 Inc.	B
							12-18 Inc.	C
							22-25 Inc.	C
							27-34 Inc.	C
							35	C
							Accrued Interest	IRCI*
12. Ferndale	(A)	9-17-40	76,600	7,913,525	1940	.9680	5-11 Inc.	A
							5-11 Inc.	B
							12-18 Inc.	C
							22-25 Inc.	C
							27-34 Inc.	C
							35-	C
							Accrued Interest	IRCI
13. Hazel Park	(1)	9-29-41	4,933,550	9,595,530	1941	51.4151	5-11 Inc.	A
							5-11 Inc.	B
							12-18 Inc.	C
							22-25 Inc.	C
							27-34 Inc.	C
							35	C
							Accrued Interest	IRCI
14. Royal Oak	(A)	2-20-42	950,156	4,661,980	1941	20.3810	5-11 Inc.	A
							5-11 Inc.	B
							12-18 Inc.	C
							22-25 Inc.	C
							27-34 Inc.	C
							35	C
							Accrued Interest	IRCI

* IRCI—Interest Refunding Certificates of Indebtedness.

"Boyles, *J.*:

In 1940 plaintiffs Hazel Park Nonpartisan Taxpayers Association and John G. Campbell filed a bill of complaint in the circuit court for Oakland County in chancery to enjoin the township of Royal Oak from collecting any taxes on property in said township lying outside of certain special assessment districts, for the purpose of paying instalments on certain refunding bonds issued by the township in 1938 to retire certain defaulted special assessment bonds issued in 1926, 1927 and 1928. The then Michigan public debt commission, now the municipal finance commission, which had authorized the issuance of the refunding bonds, the city of Highland Park and Edgar B. Whitcomb and Anna S. Whitcomb, as owners of some of the refunding bonds, and the village of Oak Park which had been organized from a portion of said township, were granted leave to intervene, and filed answers to the bill of complaint.

The township of Royal Oak as the original defendant subsequently filed an amended answer and cross bill, setting forth that after the issuance of some of the special assessment bonds or refunding bonds, the following seven municipalities: city of Royal Oak, city of Ferndale, city of Huntington Woods, city of Pleasant Ridge, city of Clawson, city of Berkley, and city of Hazel Park had annexed portions of the township's territory or incorporated portions of it within their respective cities, and were consequently chargeable with their pro rata shares of any indebtedness on such bonds which might be decreed against the township. These seven municipalities were named as cross-defendants, and appeared and filed answers.

The parties in the trial court represented four general interests: The township of Royal Oak, individual taxpayers who might be assessed for taxes to pay the refunding bonds, bondholders who accepted refunding bonds in exchange for special assessment bonds, and municipalities which might be proportionately liable to pay a pro rata share of the bonds because of acquisition of portions of the township territory through annexation or incorporation.

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The special assessment bonds were originally issued to pay for sewer and water mains under Act No. 116, Pub. Acts 1923, as amended by Act No. 263, Pub. Acts 1925, and in the case of some of the bonds by Act No. 58, Pub. Acts 1927 (for present provisions, see Comp. Laws Supp. 1940, 1945, Sec. 2385 et seq., Stat. Ann. and Stat. Ann. 1946 Cum. Supp. Sections 5.2411-5.2414).

The refunding took place under authority of an order of the public debt commission, dated January 14, 1938, pursuant to Act No. 13, Pub. Acts 1932 (1st Ex. Sess.), as amended by Act No. 143, Pub. Acts 1933, and Act No. 42, Pub. Acts 1935, and Acts Nos. 16, 56, 98, 271, Pub. Acts 1937 (Stat. Ann. and Stat. Ann. 1938 Cum. Supp. Sections 5.3201-5.3219). This legislation was repealed by Act No. 202, Pub. Acts 1943, which contains a saving clause (Comp. Laws Supp. 1943, Sections 2689-21—2689-103, Stat. Ann. 1943 Cum. Supp. Sections 5.3188(1) 5.3188(50)). Series A and B bonds refunded special assessment bonds issued on special assessment rolls 5 to 11 inclusive, prior to the effective date of Act No. 58, Pub. Acts 1927. Series C bonds refunded those issues subsequent to that date.

Commencing with the creation of each special assessment district the township began to levy special assessment taxes against the taxable property in each district, and continued such levies through the full 5 year period covered by the special assessment bonds. Instalments of principal and interest were paid for a time from collections of special assessment taxes, and from time to time thereafter with money from the general fund of the township when there was insufficient money in the special assessment funds to meet payments. On or before April 1, 1930, default was made in some of the issues, and by April 1, 1933, all of the issues were in default on interest and principal outstanding. The totals of the special assessment rolls were extremely high as compared with the assessed valuation of all taxable property in the districts. The percentage of special assessments to assessed valuation ran from a low of 6 per cent, in one district to a high of 24 per cent in another district, with an average of 13 to 14 per cent in all districts. Because of defaults in paying general taxes and special assessments,

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a large amount of property in the special assessment districts has gone through "scavenger sale."

At the time of the refunding, the township had only some $12,000 in its general fund, which was barely sufficient to pay outstanding orders already issued on that account. As of October 1, 1936, there was a total of $316,553.43 principal due on the special assessment bonds in question, and delinquent interest of $100,135.43.

Except as may be hereinafter noted, additional factual background underlying the questions raised on the instant appeal may be found in Whitman *v.* Township of Royal Oak, 269 Mich. 146; Township of Royal Oak *v.* City of Pleasant Ridge, 295 Mich. 284; Township of Royal Oak *v.* City of Pleasant Ridge, 307 Mich. 714; Township of Royal Oak *v.* City of Berkley, 309 Mich. 572.

In the circuit court the judge stated the claims of the parties as follows: The contention of the township of Royal Oak, defendant and cross-plaintiff, is that in view of the decision of this Court in the Whitman Case, supra, its contingent liability on the special assessment bonds became fixed prior to the issuing of the refunding bonds, that the refunding bonds supplanted the special assessment bonds and are now the general obligation of the township in the same manner as the special assessment bonds, and that the intervening defendants and cross-defendants, which since the issuing of the special assessment bonds have annexed portions of the township territory, are each liable for a proportionate share of the refunding bonds.

It is the contention of the city of Royal Oak, cross-defendant, that (1) in no event did the city incur any liability as the result of the first annexation which took effect October 4, 1926, because the bonds had not been issued; (2) having fully settled all obligations incurred by the city as the result of the annexations of 1927 and 1929 the city is not liable by reason of those annexations; (3) Act No. 13, Pub. Acts 1932 (1st Ex. Sess.), as amended (see Comp. Laws Supp. 1940, 1942, Sec. 2705-1 et seq., Stat. Ann. and Stat. Ann. 1942 Cum. Supp. Sec. 5.3201 et seq.), is unconstitutional in so far as it attempts to make refunded special assessment bonds general obligations, and therefore the city's liability, if any,

applies only to the annexation of 1942 and only to that portion of the refunded bonds that may be paid from recoverable special assessments.

It is the contention of the city of Ferndale, cross-defendant, that (1) the city of Ferndale did not assume any liability by reason of the detachment of territory from the township of Royal Oak when it became incorporated as a city on January 31, 1927, because there was no general obligation liability against the township of Royal Oak on that date in respect to any matters involved in this litigation. The only outstanding bonds were those issued in respect to districts 5 to 11, inclusive, and those bonds were strictly special assessment bonds; (2) the legislature by the passage of Act. No. 58, Pub. Acts 1927 (amending Act No. 116, Pub. Acts 1923) could not constitutionally impose any general obligation liability upon the township as to bonds issued prior to the effective date of that act; and that therefore bonds in respect to districts 5 to 11, dated October 1, 1926, should be eliminated from any and all consideration in determining the liability of incorporating or annexing cities, except possibly in those cases where the decision in Whitman *v.* Township of Royal Oak, supra, whether right or wrong, would be res judicata; (3) the issuance of general obligation bonds to refund strictly special assessment bonds is not constitutionally permissible.

It is the contention of the city of Pleasant Ridge and the City of Huntington Woods, cross-defendants, that (1) inasmuch as no possibility exists for reimbursements of a general fund through subsequent collections of special assessments, the 1927 amendment imposing a liability on the township to pay out of its general fund is unconstitutional, both as to bonds theretofore and thereafter issued; (2) the township of Royal Oak must reassess the deficiency in collections of special assessments in order to provide funds to discharge the obligations of the refunding bonds.

The cross-defendants city of Hazel Park, city of Berkley, and city of Clawson deny generally the claims of cross-plaintiff, the township of Royal Oak.

The contention of the bondholders Whitcomb, city of Highland Park, and municipal finance commission, inter-

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vening defendants, agrees with the contention of cross-plaintiff and asserts that the refunding bonds are valid.

The trial court held: (1) That the special assessment bonds were made contingent liabilities of the township by Act No. 116, Pub. Acts 1923, as amended by Act No. 58, Pub. Acts 1927; (2) that this act and the act authorizing the refunding bonds were constitutional; (3) that a municipality which has annexed territory not included in any of the special assessment districts is liable for its pro rata share of such liabilities; (4) that the township was not obliged to submit the issuance of bonds to electors of the township; (5) that the contingent liability of the township attached upon the confirmation of the special assessment rolls; (6) that none of the township's settlement agreements with the municipalities constituted accord and satisfaction; (7) that the township valuation to be used where there were successive annexations of territory during one year is the value shown by the current assessment rolls, less any deductions therefrom because of prior annexation or incorporation during the year; (8) that the township had no power or authority to levy additional special assessments for the purpose of paying the special assessment bonds, and that the township's failure to levy additional special assessment taxes did not affect the liability of the cross-defendant municipalities.

A decree was entered in effect as follows: (1) Specifically designating the special assessment bonds issued by the township and defining the liability of the township on the special assessment bonds thus issued, both as to original bonds and the refunding bonds; (2) declaring that the statutes under which these bonds were issued were not unconstitutional; (3) decreeing that the cross-defendant seven cities, Ferndale, Royal Oak, Hazel Park, Pleasant Ridge, Berkley, Huntington Woods, and Clawson which had incorporated or annexed portions of the township were liable to the township notwithstanding that some portions of such territory so incorporated or annexed were not included in any of the special assessment districts; (4) that the township was not required to submit to the electorate the question of issuance of the special assessment bonds or the

refunding bonds; (5) that the contingent liability of the township on the special assessment bonds was created on the dates of the confirmation of the respective rolls for the levying of special assessment taxes for the payment of such bonds and that each of the seven cross-defendant cities hereinbefore named, upon incorporation or annexation of a portion of the township territory at any time thereafter, became liable for its proportionate share of such contingent liability which existed at the time of such incorporation or annexation; (6) that the various settlement agreements between the township and the several cross-defendant cities did not constitute accord and satisfaction as to their respective rights and liabilities; (7) that where there were successive annexations during any one year the value of the taxable property of the township as shown by the total assessed valuation of all property in the township by the current assessment rolls, less any deductions therefrom because of prior incorporation or annexation of township territory during the year, must be used in determining the proper division of assets and liabilities of the township upon any subsequent incorporation or annexation of township territory during such year; (8) that the township had no power or authority to levy and collect reassessments in the special assessment districts to make up the deficiencies, and that the failure of the township to levy additional special assessment taxes for the purpose of paying the special assessment bonds did not relieve the seven cross-defendant cities hereinbefore named from their proportionate liability for the payment of such bonds; (9) that said seven cross-defendant cities were respectively liable for payment to the township of those portions of principal and interest on the special assessment bonds, the refunding bonds and certificates of indebtedness theretofore paid by the township out of funds derived by it other than from collections of special assessment taxes, and for contribution toward payment of such principal and interest remaining unpaid, to be determined according to the percentage of the assessed valuation of the taxable property of the portion of township territory incorporated or annexed by each such city at the time of each such incorporation or annexation,

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to the total assessed valuation in the township immediately before such incorporation or annexation; (10) that an accounting be had under the direction of the court between the township and the seven cross-defendant cities, to determine the total amount of money derived by the township from collections of special assessment taxes, total amount of interest and principal paid by the township on the bonds and certificates of indebtedness, and the amount which each of the said seven cities was liable to pay to the township; (11) defining the manner, method and time for such payments by the seven cross-defendant cities; (12) retaining jurisdiction for the accounting, for determining questions which might arise concerning the carrying into effect of the decree and compensation of counsel, and dissolving all injunctions previously issued.

From this decree the city of Ferndale appeals, the cities of Pleasant Ridge and Huntington Woods have joined together in a cross-appeal, and the city of Royal Oak takes a separate cross-appeal. The other parties, not having sought a review, must be considered as content with the decree.

A. Appeal of Ferndale.

The city of Ferndale contends that it is not liable for any portion of the district 5 to 11 bonds, by reason of its incorporation on January 31, 1927, first because the pertinent section of the home-rule act (1 Comp. Laws 1929, Sec. 2250) at that time provided in terms only for division of liabilities upon annexation. A clause referring to incorporation was added by Act No. 233, Pub. Acts 1931 (Comp. Laws Supp. 1940, Sec. 2250, Stat. Ann. Sec. 5.2093). If this interpretation of the original act were correct it would be of doubtful constitutionality, for the bondholder could not be required to take less security upon a division of territory. Board of Education of City of Lincoln Park *v.* Board of Education of City of Detroit, 245 Mich. 411. But appellant (Ferndale) did not raise this question at the trial, and it was not presented as a ground of appeal; therefore we will not pass upon it here. Franklin Mining Co. *v.* Harris, 24 Mich. 115; Mahiat *v.* Codde, 106 Mich. 387; Stanton *v.*

Stanton, 197 Mich. 161, 165; Donahue *v.* Gordon, 292 Mich. 581. The bonds with respect to assessment rolls Nos. 5 to 11 were issued prior to the effective date of Act No. 58, Public Acts 1927. This act added to section 3 of the original township special assessment act the following:

> "If any such special assessment fund is insufficient to pay such bonds and interest thereon when due, the township board shall advance the amount necessary, to pay such bonds, and shall be reimbursed from such assessments when collected, or by reassessment of the deficiency if necessary."

While we conclude that this is retroactive as well as prospective in effect, we do not agree with appellant that if retroactive it is unconstitutional for that reason. This provision was held to be constitutional in Whitman *v.* Township of Royal Oak, supra, p. 151, notwithstanding it was there given a retroactive effect. It follows that the contingent liability of the township relates back to the date on which liability arose on the special assessment bonds. We do not read Township of Royal Oak *v.* City of Pleasant Ridge, 295 Mich. 284, to the contrary effect. The question here presented, as to the liability of the city (Pleasant Ridge, in that case) in case of inability of the township to obtain from special assessment funds sufficient to pay the bonds in full, whereby the township might eventually have to pay a balance due on such bonds from its general fund, was not there before the Court. It was said (p. 293):

> "Should such a condition ultimately come about, there might then be room for the contention that the contingent statutory liability to advance money from the township's general funds had accrued and that payment, when made, was necessitated because it was then a general obligation of the township contracted before the severance of township territory by the defendant city. In that event the question would be presented as to whether the defendant city of Pleasant Ridge would not be liable for payment of its proportionate share of the general liability of the township which had accrued because of inability, if such should happen, to derive suffi-

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cient funds from the special assessments or reassessments to discharge in full the bond indebtedness. Suffice to say that on this appeal we do not have before us nor are we herein passing upon such a case; but a reservation might well be made in the decree to be entered in this case covering such a contingency."

Any doubt as to the holding of the Court in Township of Royal Oak *v.* City of Pleasant Ridge, 295 Mich. 284, was dispelled by this Court in Township of Royal Oak *v.* City of Pleasant Ridge, 307 Mich. 714, after a so-called consent decree which had been improperly entered in the circuit court in the original case was referred back to that court by this Court for further consideration. In the latter case we said (pp. 716, 719):

"Unfortunately, instead of the decree being entered in this Court, it was entered in the court below and it was stated therein that the special assessment bonds were not the general obligation bonds of the township of Royal Oak. Evidently due to an oversight on the part of the attorneys, all reference to the consideration of a possible future liability, should a certain condition arise, was omitted. . . . The Court was correct in granting the new decree nunc pro tunc following all the terms consented to in the decree theretofore entered in the circuit court but incorporating the wording of our opinion in leaving the liability of the city to future consideration should conditions arise so that the township of Royal Oak hereafter might claim that there was such liability."

This appellant (Ferndale) further contends that at the time of the city's incorporation, no liability existed against the township of Royal Oak, as Act No. 58, Pub. Acts 1927, which imposed the contingent liability of a guarantor upon the township, did not become effective until April 21, 1927. This is but another way of challenging the retroactive effect of that act, and it is equally without merit. Neither do we find any merit in appellant's contention that the above-quoted provision in Act No. 116, Sec. 3, Pub. Acts 1923, as

amended by Act No. 58, Pub. Acts 1927, must be held unconstitutional if applied to special assessment bonds issued prior to the effective date thereof, in that it would constitute the taking of property (of the appellant city) without due process of law. The city, by its incorporation, carved taxable real estate out of the township which, under the contingency hereinbefore referred to, would become liable to taxation to pay defaulted special assessment bonds, for which payment the township ultimately became liable, the contingency having arisen. If the ultimate liability of the city must be considered as taking property without due process of law, the owners of the remaining taxable property in the township, after a city had taken out, by incorporation (or annexation), portions of the taxable property in the township, might be in an equal position to claim that, due to their increased burden of taxation, the city, by its very incorporation, was depriving them of property without due process of law. These viewpoints would equally ignore the ultimate rights of the bondholders. In furtherance of its claim that said Act No. 58, Pub. Acts 1927, is unconstitutional in that it takes property without due process of law, appellant contends that said act authorizes the levying of a tax for a private purpose, i. e., to pay bondholders. One weakness in this claim lies in the fact that the levy is, in effect, for the purpose of paying the original expense of the special improvements, through the medium of repaying those who loaned the funds for that purpose. The position taken by appellant was answered in the negative in Whitman *v.* Township of Royal Oak, supra, citing Moore *v.* Harrison, 224 Mich. 512, and Regents of University of Michigan *v.* Pray, 264 Mich. 693. To the same effect, even though there was no possibility of reimbursement, were Graves *v.* Bliss, 235 Mich. 364, certiorari denied, 273 U. S. 724 (47 Sup. Ct. 113, 71 L. Ed. 859); City of Highland Park *v.* Dearborn Township, 285 Mich. 440; City of Highland Park *v.* Oakland County Drain Commissioner, 312 Mich. 407.

Appellant contends that the proposed tax would have no purpose other than the relief of bondholders, citing cases which have held such levies unconstitutional for that reason. We do not agree that the motives and purposes of the legis-

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lature are so lightly to be impugned. A statute may not be declared unconstitutional if there is any reasonable ground upon which its validity may be sustained. We agree with the courts which have held that the restoration of the credit of the municipality, the restoration of delinquent lands to the tax rolls, and the readjustment of the tax burden in a more equitable manner, are legitimate public purposes, which render the act constitutional even though applied retroactively. City of Crescent City *v.* Moran, 25 Cal. App. (2d) 133 (77 Pac. (2d) 281); County of San Diego *v.* Hammond, 6 Cal. (2d) 709 (59 Pac. (2d) 478, 105 A. L. R. 1155); Durrett *v.* Davidson, 122 Ky. 851 (93 S. W. 25, 8 L.R.A. (N.S.) 546); Deseret Savings Bank *v.* Francis, 62 Utah, 85 (217 Pac. 1114). See, also, City of Dunsmuir *v.* Porter, 7 Cal. (2d) 269 (60 Pac. (2d) 836). It is immaterial that private persons may receive incidental benefits from the legislation. But the discharge of a moral obligation is also a legitimate end of legislation in cases of this type. (Lyman *v.* Chase, 178 Minn. 244 (226 N. W. 633); Kinney *v.* Astoria, 108 Ore. 514 (217 Pac. 840)), and support for such legislation has been found in the continuing public benefit of the improvements themselves. Comfort *v.* City of Tacoma, 142 Wash. 249 (252 Pac. 929). See, also, dissenting opinion in Oregon Short Line R. Co. *v.* Berg, 52 Idaho, 499 (16 Pac. (2d) 373). We agree with the trial court that said act is not unconstitutional on the grounds urged, and this conclusion is in accord with the result reached in Whitman *v.* Township of Royal Oak, supra. This conclusion applies with equal force to appellant's claim that Act No. 13, Sec. 4, subd. i, Pub. Acts 1932 (1st Ex. Sess.), as amended (for refunding municipal indebtedness) is unconstitutional for like claimed reasons. We hold that both of said acts are not unconstitutional on the grounds asserted by said appellant herein.

The remaining question raised by this appellant (Ferndale) challenges the conclusion reached by the circuit court in holding that the township's liability on the special assessment bonds arose on the dates of the confirmation of the special assessment rolls. We are unable to agree with the reasoning of the trial court in that regard. Act No. 116,

Sec. 3, Pub. Acts 1923, places a lien upon the lots assessed in a special assessment district, from the date of confirmation of the assessment roll. The confirmation of a special assessment roll does not create a liability against the township but rather creates a liability against the property owner. The confirmation of a special assessment roll may be a basis for the subsequent issuance of such bonds, but not necessarily so. If the assessment should be made due in one instalment, no bonds would be issued. The holding of the trial court is contrary to the holding of this Court in Township of Dearborn *v.* City of Dearborn, 308 Mich. 284. Bonds are issued not on the date which they bear, but rather when they are delivered to the purchaser, inasmuch as no liability is created against the issuer until such delivery. Section 14 of the Michigan negotiable instruments law (2 Comp. Laws 1929, Sec. 9261 (Stat. Ann. Sec. 19.54)) reads as follows:

> "The instrument is not invalid for the reason only that it it antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto, as of the date of delivery."

The township's liability as guarantor cannot be said to arise before the bonds are issued and delivered. It is claimed that liability did not arise until the subsequent happening of the contingency, i. e., defaults and lack of special assessment funds. However, the township's liability, although contingent, was there continuously from the time of the delivery of the bonds. It is implied in Township of Dearborn *v.* City of Dearborn, supra, that this liability arises when the bonds are issued. Such a theory conforms with section 14 of the negotiable instruments law, supra. We find in the record before us that the dates of delivery of the special assessment bonds were as follows:

Rolls 5-11	October 11, 1926
12-18	August 19, 1927
22-25	April 7, 1928
26-34	August 15, 1928
35	September 26, 1928

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It was held in Township of Dearborn *v.* City of Dearborn, supra, p. 291 that the date of filing the result of the election with the secretary of State and the county clerk determines the date of incorporation, or annexation of territory detached from the township, and that the city becomes liable for contribution for indebtedness existing at the date of annexation. The liability of the city of Ferndale on rolls 12 through 18 does not, therefore, arise by reason of its original incorporation on January 31, 1927, but Ferndale does become proportionately liable thereon by virtue of the annexations of August 24, 1927, and later dates. Liability on rolls 5-11 attached to the city of Ferndale upon its incorporation as well as all later annexations. Its liability on rolls 22-25 attaches by reason of the annexations of June 14, 1928, and after; on rolls 26-35 by reason of the annexation of September 17, 1940.

The foregoing appears to be in accordance with a part of paragraph 5 of the decree, as it is construed by this Court. It might be proper to enter a clarification of said paragraph 5 when a decree is entered in this Court. The appellant city of Ferndale became liable for its proportionate share of such contingent liability in accordance herewith. Inasmuch as appellants city of Royal Oak, city of Pleasant Ridge, city of Huntington Woods have raised this same question on the appeal, the foregoing decides the issues as thus raised by them. In that connection, it is proper to add that we find from the record, that the cities of Pleasant Ridge, Huntington Woods and Royal Oak became liable as follows: City of Pleasant Ridge became proportionately liable on rolls 5-18 only, by its incorporation of December 31, 1927; city of Huntington Woods became proportionately liable on all bonds, by its incorporation of June 24, 1932; city of Royal Oak became liable on no bonds, by its annexation of October 4, 1926. It became proportionately liable on rolls 5-11, by annexation of April 22, 1927. It became proportionately liable on all bonds, by annexations of April 19, 1929, and later dates.

B. Appeal of Pleasant Ridge, Appeal of Huntington Woods.

Except for two final questions, these appellants raise the same issues as those raised by the city of Ferndale, which have been answered. In addition, these appellants, briefly joined in by the city of Royal Oak, challenge paragraph 8 of the decree wherein the trial court declared that the township had no power or authority to levy additional special assessments (reassessments ?) for the purpose of paying the special assessment bonds, and that the failure to levy such "additional special taxes" did not relieve the seven cross-defendant cities from their proportionate liability. Appellants Pleasant Ridge and Huntington Woods claim (1) that when a deficiency exists reassessment must be made; and (2) that the failure of the township to reassess such deficiencies estops it from requiring "seceding municipalities to pay a share of the loss incurred thereby."

This case was originally started by the plaintiffs to enjoin the township from levying taxes on property in the township outside the special assessment districts, to make up deficiencies in paying the refunding bonds hereinbefore referred to. The attorney for the plaintiffs who filed the original bill of complaint did not appear in court at the hearings and plaintiffs have not appealed. The original purpose of the suit seems to have been overshadowed by the cross bills and claims of the contending parties here, to obtain an adjudication of their respective rights and liabilities. The question as to whether the township, and also the cities of Ferndale and Royal Oak, should be required "by mandatory writ of injunction" to reassess the amounts of the deficiencies in the special assessment districts, was injected into the case by a late amendment (filed after the hearing was begun) by the interpleaded defendants (cross-plaintiffs) Pleasant Ridge and Huntington Woods. A new paragraph was added to their prayer for relief by these cross-plaintiffs, asking for such a "mandatory" injunction. We do not find in the record any indication that this amendment to their cross bill was answered by any of the other parties to the case. While we have repeatedly said that the court in taking jurisdiction in equity, will retain jurisdiction

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in order to do complete justice and settle all disputed questions in one proceeding, if possible, we do not consider that such a "mandatory injunction" should issue in this case, under the circumstances. Decision as to whether the township should be compelled to levy reassessments against the special assessment districts is not essential to decision on the other questions raised on this appeal.

The trial court, in paragraph 8 of the decree, referring to the effect of the township's failure to levy additional special assessment taxes, decreed as follows:

> "Defendant, township of Royal Oak, under the laws of this State had no power or authority to levy additional special assessments for the purpose of paying the special assessment bonds."

Act No. 116, Pub. Acts 1923 (1 Comp. Laws 1929, Sec. 2385 *et. seq.*, as amended (Comp. Laws Supp. 1940, 1945, Sec. 2385 *et seq.*, Stat. Ann. and Stat. Ann. 1946 Cum. Supp. Sec. 5.2411 *et seq.*)), provides for improvements by township boards. Counsel for Pleasant Ridge and Huntington Woods directs our attention to section 3 of said act, as amended (1 Comp. Laws 1929, Sec. 2387, as amended by Act No. 24, Pub. Acts 1934 (1st Ex. Sess.) (Comp. Laws Supp. 1940, Sec. 2387, Stat. Ann. Sec. 5.2413)), which provides in part that:

> "All proceedings relating to the making, levy and collection of special assessments herein authorized and issuing bonds in anticipation of the collection thereof, shall conform, as near as may be, to the proceedings for levying special assessments and issuing special assessment bonds by villages, for like improvements, as set forth in act number 3 of the public acts of Michigan for 1895, as amended, being chapter 72 of the compiled laws of Michigan for 1915, as amended. If any such special assessment fund is insufficient to pay such bonds and interest thereon when due and said bonds shall have been issued subsequent to the 21st day of April, 1927, the township board may advance the amount necessary to pay such bonds, and shall be reimbursed from such assessments when collected, *or by reassessment* of the deficiency if necessary."

Act No. 3, Pub. Acts 1895 (Comp. Laws 1915, chap. 72), as amended, referred to in the above section 3, is the general act for incorporation of villages. It may be found in 1 Comp. Laws 1929, Sec. 1465 *et seq.* (Stat. Ann. Sec. 5.1201 *et seq.*). Section 12 of chapter 8 of that act (1 Comp. Laws 1929, Sec. 1624 (Stat. Ann. Sec. 5.1360)) provides:

> "Should any special assessment prove insufficient to pay for the improvement or work for which it was levied, and the expenses incident thereto, the council may, within the limitations prescribed for such assessments, make an additional pro rata assessment to supply the deficiency."

This has been held to be mandatory. Wood *v.* Village of Rockwood, 311 Mich. 381, 389.

Said counsel for Pleasant Ridge and Huntington Woods claims that the foregoing refers to reassessment in special assessment districts, in connection with the questions raised on this appeal by said counsel for appellants Pleasant Ridge and Huntington Woods, as decided by the circuit court in paragraph 8 of the decree. We conclude that the present case is not the proper occasion to decide the question as to whether the township has the power to reassess and levy taxes against the property in the special assessment districts. That part of section 8 of the decree which purports to decree that the township does not have such power and authority will be deleted in the decree to be entered here. Many obvious problems to be settled in connection with any such reassessment have not been brought to our attention in the record and briefs in the instant case, and this is not a proper occasion for entering the "mandatory injunction" asked for by these two appellants, directing such reassessments. This we decline to do, inasmuch as the facts and circumstances which might affect such decision are not here fully before us.

As to the other claim made by these appellants, that the township is estopped from claiming liability against the seven cross-defendant cities because it has failed to reassess taxes, we have no hesitation in saying that a failure to reassess does not terminate the liability of the cross-defendant cities to share proportionately in making up the deficiencies.

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The rights of bondholders cannot thus be ignored, nor is such reassessment to be considered as a condition precedent to attaching liability to cities which by incorporation or by annexation of territory have taken taxable property out of the township. Such provision in paragraph 8 of the decree is affirmed.

A decree may be entered in this court affirming the decree from which these appeals have been taken, except in the particulars hereinbefore noted, and in consonance therewith certain provisions in said decree are hereby reversed. In such particulars the decree to be entered here will be in conformity with this opinion and it will provide for remanding to the circuit court for further proceedings in accordance with paragraph 12 of the decree.

We are not unmindful of the fact that the questions discussed herein are foreign to the issues originally raised by plaintiffs herein, in filing their bill of complaint. However, no one here questions the jurisdiction of the circuit court, or of this court on the appeal, to consider and pass upon the questions raised by the interveners, or by the cross-appellants. For that reason, we are not here in conflict with our decision in Youngs *v.* West, ante, 539, wherein the question of jurisdiction was raised. The importance of the problems discussed herein, as they may affect the hearing in the circuit court on the remand for an accounting, are sufficient justification for entertaining jurisdiction of the same on this appeal.

Parties to the appeal having each prevailed only in part, and public questions being involved, no costs awarded.

CARR, *C. J.*, and BUTZEL, BUSHNELL, SHARPE, REID, NORTH, and DETHMERS, *JJ.*, concurred.

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IN THE

Supreme Court of the United States

United States Supreme Court No.....

Michigan State Supreme Court No. 43,479
Oakland County Circuit Court No. 21,917

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION and JOHN G. CAMPBELL,
Plaintiffs and Appellants,
and
CITY OF PLEASANT RIDGE and CITY OF HUNTINGTON WOODS,
Cross-Plaintiffs and Appellants,

vs.

TOWNSHIP OF ROYAL OAK,
Defendant, Cross-Plaintiff and Appellee,

EDGAR B. WHITCOMB and CITY OF HIGHLAND PARK,
Intervening Cross-Defendants and Appellees,

CITY OF FERNDALE, CITY OF ROYAL OAK, CITY OF CLAWSON, CITY OF BERKLEY and CITY OF HAZEL PARK,
Defendants and Appellees

BRIEF OF APPELLANTS, HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, JOHN G. CAMPBELL, CITY OF PLEASANT RIDGE AND CITY OF HUNTINGTON WOODS, IN OPPOSITION TO MOTIONS OF THE APPELLEES, TOWNSHIP OF ROYAL OAK, WHITCOMB AND CITY OF HIGHLAND PARK TO DISMISS THE APPEAL

OFFICIAL REPORT OF OPINION OF THE MICHIGAN SUPREME COURT IN THIS CASE WHEN HEARD BELOW

The official report of the opinion of the Michigan Supreme Court when heard below is reported in:

Hazel Park Non-Partisan Taxpayers Ass'n. v. Township of Royal Oak, 317 Mich. 607.

APPELLANTS' CONTENTION

Appellants Contend: On behalf of the Appeal by Hazel Park Non-Partisan Taxpayers association and John G. Campbell, representatives of taxpayers as a Class that:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeals in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interest apply to and for the benefit of both the appealing and non-appealing parties.

Appellants contend: On behalf of the appeal by the Cities of Huntington Woods and Pleasant Ridge, that:

5. Municipalities being recognized by Michigan law as proper representatives in court proceedings for their taxpayers, are proper interested parties to appeal and raise constitutional questions on behalf of such taxpayers.

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FACTS

Taxpayers' Suit

This was a taxpayers' suit brought by the appellants, John G. Campbell and the Hazel Park Non-Partisan Taxpayers Association to enjoin the levying of taxes to pay special assessment bonds, which bore no general obligation credit *by assessing properties lying outside of the Special Assessment Districts.* Plaintiffs were taxpayers seeking relief under the decision of,

> *Risty v. Chicago R. I. Ry.*, 270 U. S. 378, 70 L. ed. 641

which held that it is a denial of due process of law to levy special assessment taxes against property *outside the district.*

Issues Raised by Plaintiffs' Bill of Complaint

Plaintiffs' Bill of Complaint as amended, stated in part;

> "V. That the defendant, Township of Royal Oak, its officers, agents, or employees be limited to collecting the amounts of the special assessments originally levied on the several parcels of property benefited.
>
> VI. That the defendants be enjoined from levying, or attempting to levy or collect any taxes to retire special assessment indebtedness on properties in the township not originally assessed for a benefit by virtue of said special assessment."
>
> Michigan Supreme Court Record, Page 10

and on the date of hearing the prayer for relief, was amended with leave of the court to include the following prayer:

"That this Court may decree that Act 58 of 1927, Act 26 of 1931 and Act 271 of 1937 are invalid and inoperative as to bonds issued prior thereto for the reason that these statutes if retrospective in scope, or applicable to then outstanding bonds, (a) require the raising of public funds for a private purpose contrary to Act VIII, Sec. 25 of the Michigan Constitution, (b) deny municipalities *and the taxpayers thereof* due process of law and equal protection of the laws and impair the obligation of contract contrary to the provisions of Article I, Sec. 10, Paragraph 1 of the Constitution and Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States of American and contrary to the provisions of Section 9 and 16 of Article II of the Constitution of Michigan."

Michigan Supreme Court Record, Pages 114 and 115.

Class Suit

This was a Class Suit brought on behalf of all taxpayers on property outside the Special Assessment District.

The amended Bill of Complaint states:

"That this suit is declared to be a representative suit, filed for the benefit of all persons not located within any of the special assessment districts created for the payment of the special assessment bonds hereinbefore described."

Sec. 21, page 7, Michigan Supreme Court Record

and the Opinion of the Trial Court stated:

"The parties to the suit represent three general interests. First, plaintiffs, who are individual taxpayers of the township who might be assessed for taxes to pay the refunding bonds; second, intervening defendant bondholders, who accepted refunding bonds in exchange for special assessment bonds

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which they had theretofore purchased; and, third, cross-defendant and intervening defendant municipalities, which may be liable to pay a pro rata share of the special assessment bonds or refunding bonds because of the acquisition of portions of the original township territory through annexation or incorporation."

Page 196, Michigan Supreme Court Record.

"There was a partial hearing of this case before another court in January, 1942, and the following is a statement of stipulated facts as shown by testimony taken at that time: * * * This suit is a representative suit filed for the benefit of all persons not located within any of the special assessment districts created for the payment of the special assessment bonds * * *."

Page 196 and 198, Michigan Supreme Court Record.

On appeal to the State Supreme Court the opinion of the Michigan Supreme Court stated:

"The parties in the trial court represented four general interests: The township of Royal Oak, individual taxpayers who might be assessed for taxes to pay the refunding bonds, bondholders who accepted refunding bonds in exchange for special assessment bonds, and municipalities which might be proportionately liable to pay a pro rata share of the bonds because of acquisition of portions of the township territory through annexation or incorporation."

Hazel Park Ass'n. v. Royal Oak Township, 317 Mich. 607.

Questions Raised and Passed Upon

The constitutional question of due process was raised by the amendment to the prayer of the Plaintiffs' Bill of Complaint which prayed:

> "That this Court may decree that Act 58 of 1927, Act 26 of 1931 and Act 271 of 1937 are invalid and inoperative as to bonds issued prior thereto for the reason that these statutes if retrospective in scope, or applicable to then outstanding bonds,
>
> (a) require the raising of public funds for a private purpose contrary to Act VIII, Sec. 25 of the Michigan Constitution,
>
> (b) deny municipalities *and the taxpayers* thereof due process of law and equal protection of the laws and impair the obligation of contract contrary to the provisions of Article I, Sec. 10, Paragraph 1 of the Constitution and Article V and Article XIV, Sec. 1 of the Amendments to the Constitution of the United States of America and contrary to the provisions of Section 9 and 16 of Article II of the Constitution of Michigan."
>
> Pages 114 and 115 of Michigan Supreme Court Record.

Same Questions Raised by Other Municipalities

This same constitutional question was raised by other defendant municipalities, Cities of Huntington Woods and Pleasant Ridge, by identical language:

> See Michigan Supreme Court Record, pages 116 and 117.

Thus, the same identical issue and constitutional question was presented by the appellants in this cause, namely, plaintiffs John G. Campbell, and Hazel Park Non-Partisan Taxpayers Association and Cross-plaintiffs, Cities of Huntington Woods and Pleasant Ridge.

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Plaintiff Campbell Represented Taxpayers as a Class

The plaintiffs John G. Campbell and Hazel Park Non-Partisan Taxpayers Association paid a retainer fee to the original attorney representing them, Harry Marx, who filed the pleadings on their behalf;

See Michigan Supreme Court Record, page 11.

Subsequently on April 15, 1942 before the trial of this cause, one Harold Street was substituted as attorney for the plaintiffs. By this time plaintiffs had run out of funds and were not able to finance further legal services. Further, the attorney Harold Street had entered the United States Army and subsequently the Federal Bureau of Investigation during the war, and this left the plaintiffs without legal counsel to represent them in this cause.

(See affidavit of Harold Street attached hereto, pages 37-38.)

No other attorney was substituted for the plaintiffs.

(See affidavit of John Campbell attached hereto page 34.)

Plaintiff Campbell Appeared at the Circuit Court Hearing on Behalf of the Class, But Without Legal Counsel

Mr. John G. Campbell was the only person appearing for or representing the taxpayers as a class on the date of hearing, for the reason there were no other officers available of the Hazel Park Non-Partisan Taxpayers Association, nor did that organization have any funds for such purpose. Thus, for all practical purposes Mr. John G. Campbell individually represented all taxpayers as a class.

(See affidavit, page 34.)

Plaintiff Present at the Trial

On the trial date, January 4, 1945, plaintiff John G. Campbell appeared in court, stated he was without counsel to represent him and that his attorney was in the service, and that he did not know what he should do about it. He was led to believe, by the attorneys present, that the taxpayers' rights and legal position would be fully cared for by the testimony and legal counsel of other interested parties, and that he need do nothing further to protect the taxpayers' interests, and that the taxpayers as a class would be fully represented and their rights protected by other parties. He did not know anything further was required of him or of the taxpayers as a class in order for their complaint to be fully heard and passed upon by the court. (See affidavit, page 34.) The settled case shows this to be true. Mr. Gillespie, attorney for the Township of Royal Oak, confirmed this by the following language in his opening statement:

> "Mr. Gillespie: I think, from what was said at the time this case was set for trial, the plaintiff will not be represented by counsel. I think we ought to set forth that at the previous hearing, when this case was set for trial, that the plaintiff John G. Campbell was in court and stated that he had no attorney and indicated that he was willing to let the case proceed without counsel representing the plaintiffs. * * *"
>
> Michigan Supreme Court Record, page 127.

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Plaintiff Present in Court—Not Defaulted

Mr. John G. Campbell was present in court. He was not defaulted. He was an active party to the contest although he was without counsel. (See affidavit, page 35.) The case was tried and appeal was subsequently taken by several municipalities, including the Cities of Huntington Woods and Pleasant Ridge on the same constitutional grounds which are now asserted in the United States Supreme Court. They are the identical grounds upon which the taxpayers relied in their Bill of Complaint.

No Notice to Plaintiffs of Settling or Filing Decree

Through some inadvertence of counsel Mr. Campbell received no copy of the Trial Court's Opinion, received no notice of settlement of the decree in the Trial Court and received no notice of presentation of settlement in the Trial Court, as required by Michigan Court Rule and Statute.

(See affidavit, page 35.)

Plaintiff Ignorant of Appellant Procedure to the Michigan Supreme Court

After the lower court decree was entered and appeal taken Mr. Campbell inquired of attorneys in the litigation as to the status of the case and was advised that the taxpayers rights were being fully protected and asserted on the appeal. He did not know about the need of filing a Claim of Appeal or Assignment of Errors or other similar appellant procedure. He believed that nothing further was required to be done on his part in order to protect and assert the taxpayers rights in said litigation.

(See Campbell affidavit, page 35.)

Filed No Claim of Appeal or Assignment of Errors—Advised Not Necessary

Plaintiff Campbell filed no Claim of Appeal or Assignment of Errors and was not represented by counsel on the appeal or before the Supreme Court cause. He was advised that their rights would be fully protected by the other appealing parties.

(See Campbell affidavit, page 35.)

Joined in Appeal to the United States Supreme Court

On learning of the decision of the Michigan Supreme Court, Mr. Campbell discussed the matter with the counsel for the appellants, Cities of Pleasant Ridge and Huntington Woods and for the first time learned that he should join in the appeal if the appeal was to be taken. Here he was for the first time advised that his name should be added to appellant papers and therefore a substitution of attorneys was obtained and an appeal sought and granted on his behalf jointly with other appellants.

Good Faith Representative of Taxpayers

As a Class

Plaintiff, John G. Campbell, has at all times been the proper representative of the taxpayers as a Class. He has acted in good faith. The law and facts relative to the taxpayers' position has been fully shown in evidence, argued and briefed by counsel, and passed upon by both courts. Any action which he might have taken by way of filing a Claim of Appeal or Assignment of Errors would have added nothing to the procedure or the results obtained.

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Motion to Dismiss

The appellee, Township of Royal Oak, has moved to dismiss the appeal because plaintiff on behalf of the taxpayers as a Class did not perform the technical requirement of filing a Claim of Appeal and Assignment of Errors on the appeal from the Circuit Court to the State Supreme Court. It is urged by the appellee, Township of Royal Oak, that the rights of thousands of taxpayers represented by plaintiff as a Class, are thus to be lost.

APPELLANTS' CONTENTION
(Summary of Argument)

The appellants assert, on behalf of the Appeal by Hazel Park Non-Partisan Taxpayers Association and John G. Campbell, representative of taxpayers as a Class, that:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in a Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeal in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interests apply to and for the benefit of both the appealing and non-appealing parties.

Appellants contend on behalf of the appeal by the Cities of Huntington Woods and Pleasant Ridge that:

5. Municipalities being recognized by Michigan law as proper representatives in court proceedings for their taxpayers, are proper interested parties to appeal and raise constitutional questions on behalf of such taxpayers.

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ARGUMENT OF LAW

I.

Appellants contend:

I. **APPEALS WILL NOT BE DISMISSED FOR DEFECTS IN PROCEDURE WHICH ARE NOT KNOWN TO PARTIES NOT REPRESENTED BY COUNSEL.**

"Questions not raised in the trial court have been considered on appeal or review in some instances upon the ground that the failure to raise such question below was, under the particular circumstances, excusable, as, for example, where the accused in a criminal case, conducting his own defense, failed to make a motion for a new trial until after judgment, due to his ignorance of the rule requiring that such a motion be made before judgment."

3 Am. Jur. 39;
Stecher v. State, 202 Wis. 25, 231 N. W. 168, 70 A. L. R. 203.

II.

Appellants contend:

II. **ASSIGNMENTS OF ERROR ON APPEAL TO AN INTERMEDIARY COURT ARE NOT NECESSARY PREREQUISITES TO A SUBSEQUENT APPEAL WHERE THE INTERMEDIARY COURT FULLY PASSED UPON THE CONSTITUTIONAL QUESTION INVOLVED.**

While assignments of error may be necessary as a general rule, still in equity they may not be necessary.

Wernik v. Collins, 234 Mich. 224, 207 N. W. 842.

An appellate court may consider plain errors or fundamental or serious errors apparent on the face of the record, even though they have not been properly assigned.

4 C. J. S. 1735;
University Indemnity Co. v. Tenery, 39 P. 2d 776;
Baker v. Denver Co., 210 P. 845, 72 Colo. 233.

Even though the pleadings do not raise a constitutional question, if the trial or appellate court expressly passes upon the question, the one aggrieved thereby may appeal from such ruling on the constitutional ground.

> "The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice."
>
> *Hormel v. Helvering*, 312 U. S. 552, 85 L. Ed. 1037

III.

Appellants contend:

III. APPEALS SHOULD BE ALLOWED FOR PARTIES ACTING ON BEHALF OF A CLASS IN A CLASS SUIT LITIGATION WHENEVER JUSTICE REQUIRES THAT THE RIGHTS OF SUCH CLASS BE PROTECTED BY APPEAL.

Class Suits Must Have Fair Representation

> "In cases to which the doctrine of representation applies, and one or a few parties are permitted to sue and defend on behalf of many, care must be taken that a party or parties to the record fairly represent the interest or right involved, so that it may be full and honestly tried. * * *"
>
> *39 Am. Jur.* 922;

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United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 S. Ct. 650;
Smith v. Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942.

Must Be Prosecuted With Diligence

Those voluntarily assuming the duty to prosecute a class suit are legally and equitably bound faithfully and honestly to discharge such duty.

39 Am. Jur. 928;
Kelly v. W. C. Turnbow Petroleum Corp., 137 S. W. 2d 216.

Members of a class, not present in court, may be bound by the judgment of the court only where they are in fact adequately represented by parties who are present, and provided that the procedure is so devised and applied as to insure that those present are of the same class as those absent,

"and that the litigation is so conducted as to insure the *full and fair consideration of the common issue.*"

In *Hansberry v. Lee,* 85 L. ed. 22, 311 U. S. 32, 132 A. L. R. 741.

In the case of, *Kelly v. Turnbow Corp.,* 137 S. W. 2d 216 the court said,

"• • • Those so voluntarily assuming the duty to prosecute such a class suit *are legally and equitably* bound to faithfully and honestly discharge such duty."

And, they must prosecute in good faith with vigor and reasonable capacity,

Hallett v. Moore, 185 N. E. 478.

It can hardly be called fair representation or a suit prosecuted with diligence if the technical appellate rules are to be used to foil the efforts of the representative.

Justice demands that the class be protected against mistakes or errors made in good faith by their representatives particularly where they have not prejudiced any party.

Here the representative of the class was without counsel,

See Campbell affidavit, pages 34-35.

and did not know of the appellate requirements, nor did the court or counsel advise him.

See Campbell affidavit, pages 34-35.

in good faith he believed he was doing everything necessary to represent the taxpayers as a class,

See Campbell affidavit, pages 34-35.

The obvious truth, therefore was that the court felt that taxpayers rights were fully protected. Thus, it would be a miscarriage of justice to now hold that taxpayers as a class are excluded from appellate rights primarily because the court neglected to protect their rights through the technical error of the representative.

The duty of appeal rests upon the representative of the class, not only to appeal, but also to defend or prosecute the appeal,

Vanderburg County v. Sanders, 30 N. E. 2d 713, 131 A. L. R. 1048

where injustice would result.

In, *Fleming County v. Plummer* (1930) 31 S. W. 2d 897, 235 Ky. 506 in discussing the question of dismissal of a class suit it was said,

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"This rule has some qualifications, and limitations when the suit has been brought by the plaintiff in a representative capacity. * * * suit will not be dismissed if the substantial rights of other parties have accrued and injustice will be done them by permitting the discontinuance, and it usually requires that bad faith or collusive action be shown."

See also *91 A. L. R.* 587.

IV.

IV. APPEALS IN EQUITY CASES ARE HEARD DE NOVO IN THE APPELLATE COURT AND DECISIONS WHICH AFFECT PARTIES JOINTLY INTERESTED OR HAVING COMMUNITY OF INTERESTS INURE TO AND FOR THE BENEFIT OF BOTH THE APPEALING AND NON-APPEALING PARTIES.

Equity Appeals De Novo

Equity appeals are heard *de novo* under Michigan law,

Sipes v. McGhee, 313 Mich. 614, 25 N. W. 2d 166;
Todd v. Ratz, 313 Mich. 111, 20 N. W. 2d 830.

Decisions Affecting Parties With Community or Joint Interest

When parties have a joint interest or an interest in common the decision, on appeal of one, will likewise affect and inure to the benefit of the other.

In the case of, *King v. Emmons,* 823 Mich. 116 a bill was filed by a guardian ad litem appointed by the Probate Court seeking a receiver and other relief in the Circuit Court. The defendants both moved to dismiss and on denial of the motions the defendant Cummings Foundation appealed to the Supreme Court (the defendant Emmons not appealing), and the Supreme Court vacated

the order which appointed the receiver and granted injunctive relief without prejudice on the ground that the guardian ad litem could only be appointed in the Circuit Court.

The Court said:

> "Notwithstanding defendant Emmons did not appeal from the Circuit Court's denial of his motion to dismiss, since it has now been determined that Mr. King is not a proper party plaintiff in this suit, the order of dismissal should be operative in favor of both defendants."

In the case of, *Haeft v. Kock*, 171 Mich. 564 a judgment was secured against joint defendants, and a part of them appealed, others not appealing. It was held that when the judgment was reversed the entire cause must be tried again *de novo*. As to the other defendants who defaulted and suffered judgment to be entered against them, the Court said:

> "• • • While it has been recognized as a general rule that only the rights of the parties before the court can be adjudicated on appeal, it has, nevertheless, been held that where the parties appealing and those not appealing stand upon the same ground, and their rights are involved in the same question and equally affected by the same judgment, the court will consider the whole case and settle the rights of all parties even though defendants not appealing are in default.
>
> *Wood v. Cullen*, 13 Minn. 394 (Gil. 365);
> *Alling v. Wenzel*, 133 Ill. 264 (24 N. E. 551);
> *Tompkins v. Wiltberger*, 56 Ill. 385;
> *Mohr v. McKenzie*, 60 Ill. App. 575;
> *Bradford v. Taylor*, 64 Tex. 169."

The very municipalities, Huntington Woods and Pleasant Ridge, which did fully follow appellate procedure to the state Supreme Court are actually morally bound to represent their taxpayers.

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It would be wise and judicious to hold that in asserting the identical contention of the taxpayers as a Class they thereby become at least temporarily the class representative.

One who owes a duty to the Class for whose benefit the action is maintained is a proper representative of the Class,

47 C. J. 47;
Whitmore v. New York Co., 158 App. Div. 178, 142 N. Y. S. 1098.

It was the duty of the trial court to guard the rights of the taxpayers as a Class to the extent of making sure they were being vigorously and fairly represented. The court was bound to take control from the representative if he failed in this regard.

39 Am. Jur. 928;
91 A. L. R. 590.

We therefore contend that plaintiff's appeal is properly before the Supreme Court of the United States because:

1. An appeal will not be dismissed for defects in procedure which are not known to parties who are not represented by Counsel.

2. Assignments of Error on an appeal to an intermediary court are not necessary prerequisites to a subsequent appeal when the intermediary court fully passes upon the constitutional questions involved.

3. An appeal should be allowed to representative parties acting on behalf of a Class, in Class Suit litigation, wherever justice requires that the rights of such Class be protected by appeal.

4. Appeals in equity cases are heard *de novo* in the appellate court and decisions which affect parties jointly interested or having community of interest apply to and for the benefit of both the appealing and non-appealing parties.

Supporting Affidavits

Attached hereto as exhibits are supporting affidavits of John G. Campbell, plaintiff in this cause and Harold Street, one time attorney for plaintiff affirming all facts set forth in this statement which are not of record in this cause. See pages 33 to 38. The originals have been filed with the clerk of this Court.

V.

Appellants contend:

V. MUNICIPALITIES BEING RECOGNIZED BY MICHIGAN LAW AS PROPER REPRESENTATIVES IN COURT PROCEEDINGS FOR THEIR TAXPAYERS, ARE PROPER INTERESTED PARTIES TO APPEAL AND RAISE CONSTITUTIONAL QUESTIONS ON BEHALF OF SUCH TAXPAYERS.

Question at Issue

The real question at issue in this case must be kept in mind, namely as we contend,

> *"• • • It is a denial of due process to tax for private purposes—viz., a gift to bondholders."*

Opposing counsel have moved to dismiss our appeal, contending that the municipalities, Pleasant Ridge and Huntington Woods, cannot raise the "due process" question.

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The cases cited by opposing counsel hold that,

> "• • • the power of the State to control its own governmental agencies and political subdivisions is unrestrained by the requirements of due process of law, and since the requirement is a limitation upon the State itself, it is not available to the State or its agencies or political subdivisions, *16 C. J. S.*, p. 1158."

Municipality May Raise Constitutional Questions on Behalf of the Taxpayers

But these cases cited by counsel *do not hold that the municipality may not raise the question on behalf of its taxpayers.* To the contrary, even when a constitutional question may not be raised on behalf of the municipality as an entity, it nevertheless may raise the question on behalf of its taxpayers. Thus in the case of,

> *Board of Education Lincoln Park v. Board of Education City Detroit*, 245 Mich. 411.

the Michigan Supreme Court held that a school district might raise the constitutional question of impairment of contract on behalf of the taxpayers and bondholders even though the municipality derived no protection from the constitutional provision.

Again in the Michigan case of, *City of Saginaw v. Consumers Power Company*, 213 Mich. 460 the Michigan Supreme Court held that the City of Saginaw had the right to maintain a suit for the relief of its inhabitants against unlawful lighting rates even though it had no direct interest in the case.

It is a prerogative of each State to determine who may be a proper party plaintiff litigant, and thus it appears that the Michigan cases have clearly permitted a

municipality to raise a constitutional question for the protection of its taxpayers. An aggrieved municipality may appeal, *City of Savannah v. Jesup*, 106 N. S. 563, 27 L. ed. 276 for one in a representative capacity has an interest justifying an appeal, *Hassall v. Wilcox*, 115 U. S. 598, 29 L. ed. 504.

In the case of *Board of Education Lincoln Park v. Board of Education Detroit*, 245 Mich. 411, *supra*, the Michigan Supreme Court permitted these two municipalities to raise constitutional questions solely for the benefit of bondholders and taxpayers saying as follows:

> "While the legislature possesses the power to detach a part of the territory from one school district and attach it to another, and may 'apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable' (*Kies v. Lowrey*, 199 U. S. 233, 240 (260 Sup. Ct. 27)), it may not impair the obligation in the bondholders' contract by taking such action without making provision for the payment thereof.
>
> "It is suggested that the bondholder alone may raise the question here considered. The plaintiff has paid the interest on these bonds, and here seeks to compel payment by the defendant. It may hereafter decline to make such payment and of the principal debt when it falls due. The remedy of the bondholder would be as above stated. In our opinion it would not only be unjust to require the bondholder to be put to the expense of such action when its rights can be fully determined in the proceeding before us, but also unjust to the plaintiff to require it to make default in payment and be subjected to the expense incident to such a proceeding."

In the case of *City of Saginaw v. Consumers Power Company*, 213 Mich. 460, the Michigan Supreme Court permitted the City of Saginaw to maintain a suit to pre-

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vent illegal lighting charges, as the representative of its inhabitants and said:

> "We have thus far under this head considered the rights of the city as a consumer of commercial light and power. We have reached the conclusion that it may not as such consumer of commercial light and power maintain this bill for the specific performance of a contract by the terms of which it is not bound. By the bill no question of discrimination is raised and relief is solely sought by virtue of the contract. The contract being an unenforceable one, the city as an entity, as a consumer of power, is without relief by way of specific performance on the facts stated in the bill.
>
> "But it does not follow that the city may not maintain this bill on behalf of the public, on behalf of its citizens, on behalf of the consumers of commercial light and power. We have already pointed out that contracts for private commercial lighting and power do not fall within the inhibition of section 3427, 1 Comp. Laws 1915, and that the contract was a valid and enforceable one so far as it relates to the inhabitants of the city. Because the city is not entitled to all the relief it asks it does not follow that it is not entitled to any. Upon a motion to dismiss, the bill should be sustained if any ground for equitable relief is stated, even though imperfectly. *Watson v. Wagner*, 202 Mich. 397; *Dewey v. City of Flint*, 205 Mich. 195. We think the city as representative of its inhabitants may maintain this bill in their behalf and thus avoid a multiplicity of suits. In *Muncie Natural Gas Co. v. City of Muncie*, 160 Ind. 97 (66 N. E. 436, 60 L. R. A. 822), the court, speaking through Mr. Justice Gillett, said:
>
> " 'As applied to this case, it is a matter of public expediency that by one suit rights shall be established for the time that the injunction has to run, instead of hundreds of the inhabitants of the city being each compelled to sue to vindicate his right, or

otherwise to submit to a small but annoying injustice.' "

Thus the doctrine of Michigan is clearly established that a municipality may raise constitutional questions on behalf of its inhabitants and taxpayers.

Representative Suits Are Necessary to Justice

Though political subdivisions are merely creatures of the Legislature, they still are operated for the benefit of their constituents. So too unconstitutional laws operating against municipalities generally penetrate through the municipality so that the taxpayers are the parties actually injured.

It would indeed be a denial of justice and a contradiction of our representative form of government to hold that a municipality might not represent its people in a case such as this. Only one citizen in a thousand is financially able to pay the legal fees and costs of an appeal upon constitutional grounds to the United States Supreme Court. It might be urgent that a group of taxpayers can be organized to carry on such litigation. But no such "group action" will be taken unless a large group of taxpayers can first be organized by the hard work and ingenuity of the organizer, so as to each contribute something toward the legal expense. Who is to do this thing? Not a lawyer, for he would then be accused of soliciting business and breach of ethics. Not a lay person, because he would generally be unversed in the intricacies of constitutional law. Further, taxpayers cannot even enter into so-called "class suits" in most instances, for in such case someone still must put up the money for the litigation and there is no way of providing the cost of a taxpayer's class suit out of the *"res."*

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The simple truth is, if we want the question to stand honest surveillance, unshielded by the prosaic legal doctrine that,

> "only one injured by unconstitutionality may complain"

such unconstitutional injustices would not otherwise be raised in the vast majority of cases because there is no one to fight the battle of the ordinary taxpayer.

Thus *taxpayers rights* in this day and age *must be protected by their servant and representative, the municipality itself.*

To deny this is to limit the service of municipalities to their taxpayers to the legislative and executive functions of government and leave them helpless in this feature of judicial protection.

To follow opposing counsels reasoning, a municipality cannot object, but must supinely levy, collect, and disburse taxes for all manner of private and unlawful purposes. This is indeed oppression by antiquated legal doctrination.

This would be a farce and a mockery of due process guarantees. It is the very type of illustration used by those who would destroy one capitalistic system. To protect American Democracy we must be ever vigilant to guarantee simplicity and facility of access and hearing before our courts. It is not enough to provide a "right to a hearing" if that right is actually denied by prohibitive cost, ponderous procedure, or the pitfalls of technicality.

Appellant Municipalities Being the Instrumentalities Enforcing the Unconstitutional Statutes Should Therefore Be Permitted to Raise the Constitutional Question for the Benefit of Their Taxpayers

If appellant municipalities are denied the right of appeal and the decision of the Supreme Court of Michigan in the case at bar is sustained, appellant municipalities will be required to advance funds to pay the bonds in question and to assess their taxpayers at large to pay for the bonds. Thus these municipalities will be the agencies perpetrating unconstitutional taxation. Subsequently taxpayers if their rights are not determined herein, may re-litigate this matter and enjoin such tax collection. The cities, appellant, are therefore in the position of a ministerial officer, who must be permitted to raise a constitutional question because otherwise he will be injured by, or liable for his own actions in enforcing the unconstitutional statute.

See, *11 American Jurisprudence* 763.

Decisions in Other Jurisdictions

Numerous decisions in other jurisdictions sustain the same doctrine.

Representative Action for Inhabitants

> "In many instances, a municipal corporation may bring a representative action in behalf of its inhabitants to protect, preserve, or establish a common right. Among other results of such practice, a multiplicity of suits is avoided. Where such an action is brought, it is not brought by the common council as such, for the members of that body merely represent the municipality. The municipal corporation sues, and it is composed of the inhabitants of the locality.

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Thus, a municipality has authority to file a bill to restrain a breach of a contract for the furnishing of utility service under specified terms, notwithstanding its inhabitants or citizens can redress the wrong individually or collectively, and is a proper party in proceedings to require a public service company to continue the performance of its public service in a reasonably adequate manner for the benefit of the municipality and its inhabitants. Such an action is not to recover loss or injury suffered by an individual, but is brought by the municipality, representing the inhabitants, to prevent a possible loss or inconvenience to them by a noncompliance on the part of the utility company with the contract made by it with the municipal corporation. In a similar type of action involving the identical interest of many inhabitants of a municipal corporation, the municipality is a proper party to be made defendant in the suit as representative of all interested."

38 American Jurisprudence 424.

"A municipal corporation has the authority, in behalf of the people, to maintain an action for the purpose of preserving the rights of the general public in, and to the use of, public property and premises. Similarly, in such a case, where the municipality is a defendant, it is the representative of the public. Under particular statutory provisions, it has been held that a municipality may maintain an action for the benefit of individuals injured by the breach of a contract for the construction of a public improvement."

38 American Jurisprudence 424.

"Under many circumstances, a municipal corporation may maintain actions as the representative of its inhabitants or citizens. There is little authority dealing with the question whether an action by a municipality is a bar to an action by citizens of the

> municipality involving the same matter. The position has been taken that where there is a suit already pending on behalf of a municipality concerning a matter of general interest to all citizens, a subsequent suit against the same defendant brought by individual citizens of the municipality in respect of the same subject matter will be barred by the pending suit. Such holding is based upon the analogous rule of *res judicata.*"
>
> *38 American Jurisprudence* 414-5.

In *First Const. Co. of Brooklyn v. State of New York,* (New York Court of Appeal) 116 N. E. 120, it was held that where the Plaintiff sought to make the State pay for rights acquired in real property claimed to have been obtained from or through Legislative enactments, the State may defend on the ground the laws are unconstitutional.

In the case of *State v. Walmsley* (Louisiana 1935), 160 So. 91, it was held that the State and Attorney General have sufficient interest in constitutionality of a statute amending and re-enacting the statute establishing a sewerage and water board for New Orleans and defining its powers to bring suit attacking the constitutionality of a statute where the ability of the state to market its obligations and those of its agencies with agencies of federal government, such as Public Works Administration, had been affected by statute, and phases of public health and employment of citizens of city and state were dependent upon determination of constitutionality and scope of statute (Act No. 36 of 1934, 2d Ex. Sess.).

The decision reads in part,

> "This is a suit by the state, and by the Attorney General, in his official capacity, he being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervener.

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> It is alleged by the plaintiffs that Act No. 36 of the Second Extra Session of the Legislature, approved November 21, 1934, is unconstitutional, null and void for the six reasons enumerated in article 13 of the petition; that if the provisions of said act are complied with, irreparable injury will be done to the state, the city of New Orleans, the property taxpayers of said city, and to certain of its bondholders; and that the several officers and boards mentioned in article 15 of the petition will comply with the provisions of said act, unless enjoined and restrained from so doing.
>
> For the foregoing reasons, there is no doubt in my mind that the Attorney General possesses the power and authority to file this suit."

In *Davis v. McCasland* (Oklahoma 1938), 75 Pac. (2d) 1118, the syllabus by the court states,

> "A city in its capacity as trustee for all interested bondholders of a paving district may question the constitutionality of an act affecting the rights of such bondholders, and neither it nor its officers acting for it in such capacity can be compelled by an unconstitutional law to act prejudicially to such bondholders."

The case states,

> "J. C. McCasland, owner of property in a paving district in the city of Duncan, purchased some paving bonds and tendered them to the city clerk in payment of his paving assessments as permitted by chapter 58, Session Laws 1933, 62 Okl. St. Ann., pars. 341-346. Upon refusal of the clerk to accept the bonds, McCasland brought suit in mandamus against the clerk and the city, and the district court awarded him full relief. The city clerk and the city appeal, alleging the unconstitutionality of the 1933 law.

"McCasland contends that neither the city nor the clerk can raise the constitutional questions involved. This contention, if sound, disposes of this case and leaves the constitutional questions for a proper case.

"The general rule, of course, is that a party without a personal interest in a matter cannot question the constitutionality of an act involving such matter, nor can one who is not a party to a contract assert that an act of the Legislature impairs the validity of such contract. Has the city such an interest?

"The city in its capacity and duties under a paving bond contract has been termed 'trustee for all the interested bondholders,' *Service Feed Co. v. City of Ardmore,* 171 Okla. 155, 42 P. 2d 853, 857; and the trustee of an express trust, *Straughn v. Berry,* 179 Okl. 364, 65 P. 2d 1203. It is apparent, therefore, that the city had a duty to perform that was not purely ministerial as well as an interest in the results of the collections. It has been held that the trustee of an express trust is not estopped from setting up in his character as trustee any defense which the *cestui que trustent,* were they in person defending the action, might properly urge in their own behalf. *Wagnon v. Pease,* 104 Ga. 417, 30 S. E. 895. See *Producers' State Bank of Wilson v. Clark,* 102 Okl. 181, 228 P. 986. We conclude, therefore, that the city has such interest, both in its own right and as trustee, to enable it to raise the constitutional questions involved, that is, whether or not the act of 1933, *supra,* violates section 15, article 2, of the Oklahoma Constitution, and section 10, article 1, of the Constitution of the United States."

In *Simmons v. Ericson* (S. D. 1929), 223 N. W. 342, plaintiff as land owners within a school district *outside* municipal boundaries brought an action to restrain the spreading of taxes. The school district intervened alleging unconstitutionality of a state statute on the ground it authorized a discriminatory and non-uniform tax.

The decision states,

> "We think the placing of agricultural lands within the school district in a different class than that of other real estate is not based on differences in the character of the property which furnish a reasonable ground for making a distinction between the two classes, and that it really results in permitting agricultural land to escape a burden imposed on other real estate situated in substantially similar circumstances and conditions.
>
> "Appellant contends that respondent is not in a position to raise the constitutional question in this case because the 10-mill levy on agricultural lands and the 25-mill levy on other property within the district would raise sufficient funds for the current running expenses of the district in addition to the amount required for the bond interest and sinking fund, and for that reason the school district is not in a position to claim that the law is unconstitutional, but this argument overlooks the fact that none of the owners of nonagricultural property are parties to the action and therefore they cannot be bound by the judgment. If, as we hold, the law is unconstitutional as imposing a higher rate of taxation upon them than upon owners of agricultural property within the district, then they would be in a position to resist the levy of 26.52 mills on their property, on the ground that it was excessive as to them, in which event respondent would be deprived of the revenue necessary to meet its current expenses. *It cannot, therefore, be said that respondent has not such an interest in the result of this case as entitles it to raise the question of the constitutionality of the act.*"

In *State v. Doane* (Kansas), 159 P. 38, the state brought a mandamus action to test the constitutionality of one of its election laws.

The decision states,

> "The state is a proper party—indeed, the proper party—to bring this action. The state is always interested where the integrity of its Constitution or statutes is involved.
>
> 'It has an interest in seeing that the will of the Legislature is not disregarded, and need not, as an individual plaintiff must, show grounds of fearing more specific injury. *State v. Kansas City*, 60 Kan. 518 (57 Pac. 118).' *State v. Lawrence*, 80 Kan. 707, 103 Pac. 839.
>
> Where the constitutionality of a statute is in doubt the state's law officer, its Attorney General, or county attorney, may exercise his best judgment as to what sort of action he will bring to have the matter determined, either by *quo warranto* to challenge its validity (*State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662) by mandamus to compel obedience to its terms (*State v. Dolley*, 82 Kan. 533, 108 Pac. 846), or by injunction to restrain proceedings under its questionable provisions (*State ex rel. v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122)."

Respectfully submitted,

STANTON G. DONDERO,
Attorney for Appellants, Hazel Park Non-Partisan Taxpayers Association, John G. Campbell, Cities of Pleasant Ridge and Huntington Woods,
521 Washington Square Bldg.,
Royal Oak, Michigan,
ARTHUR E. MOORE,
Of Counsel,
521 Washington Square Bldg.,
Royal Oak, Michigan.

Dated: October 27, 1947.

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AFFIDAVIT OF JOHN G. CAMPBELL IN SUPPORT OF BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS APPEAL

(Title of Court and Cause)

State of Michigan,
County of Wayne—ss.

Now comes John G. Campbell being first duly sworn deposes and says:

1. That he is the plaintiff in the above entitled cause and was the President of the co-plaintiff Hazel Park Non-Partisan Taxpayers Association at the time of the filing of the Bill of Complaint in said cause.

2. Deponent further states that he makes this affidavit in support of the Brief of appellants in opposition to motion to dismiss appeal.

3. Deponent further states that said cause of action was filed by said plaintiff as a Class Suit on behalf of themselves, and all other property owners who own property lying outside of the Special Assessment Districts in question, seeking injunctive relief prohibiting the levying of taxes for the payment of Special Assessment Bonds in question, against properties lying outside of the Special Assessment Districts.

4. Deponent further states that throughout the litigation in this cause plaintiffs were recognized and treated as the representatives of said taxpayers as a class.

5. Deponent further states that he voluntarily entered upon the duty of representing said class of taxpayers and did to the best of his ability pursue said litigation with

diligence and attempted to protect and enforce the rights of said class.

6. Deponent further states that the original Bill of Complaint was prepared for plaintiffs and filed by one Harry Marx, attorney of Detroit, Michigan, who was paid a retainer fee for such service. Subsequently on April 15, 1942, prior to the trial in this cause in the Circuit Court one Harold Street, an attorney of Detroit, Michigan, was substituted as plaintiffs' counsel.

7. By this time plaintiffs were without funds with which to finance said litigation and were not able to pay further legal fees.

8. That said Harold Street entered the United States Army and subsequently the Federal Bureau of Investigation during the World War, so that at the time the said cause of action came on for trial, plaintiffs were without legal counsel to represent them in said cause, and plaintiffs were unable to secure other counsel therefor.

9. At the opening of the hearing in said cause in the Circuit Court your affiant, Mr. John G. Campbell, was the only person appearing for or representing the taxpayers as a class, for the reason there was no other officer of the Hazel Park Non-Partisan Taxpayers Association available; and for the further reason that neither said association nor your deponent had funds with which to hire another attorney.

10. On the trial date, January 4, 1945, plaintiff, John G. Campbell, appearing in court stated that he was without counsel to represent him and that his attorney was in the Armed Service and that he did not know what he should do about it. He was led to believe by the attorneys present that the rights of said taxpayers as a class would

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be protected and their legal position cared for by testimony and other counsel interested in said cause, and that he need do nothing further to protect the interests of said taxpayers as a class, and that they would be fully represented and their rights fully protected by other parties. He did not know anything further was required of him or the taxpayers as a class in order for their complaint to be fully heard and passed upon by the court.

11. Neither Mr. John G. Campbell or the Hazel Park Non-Paristan Taxpayers Association were dismissed, defaulted or otherwise removed from active participation in said litigation. Mr. Campbell was present in court at said trial, but he was not represented by counsel.

12. Deponent further states that neither he nor the Hazel Park Non-Partisan Taxpayers Association received any copy of the Opinion of the Trial Court, any notice of settlement of the decree in the Trial Court, or any notice of presentation of decree for settlement as required by the rules and practices of said court and the statute in such case made and provided.

13. After the lower court decree was entered and after an appeal was taken to the Supreme Court of the state, deponent inquired of attorneys in the litigation as to the status of the case and was advised that the taxpayers' rights were being fully protected and asserted on the appeal.

14. Deponent is a lay person untrained in the law and did not know anything concerning the manner in which appeals are take, nor did he know of the need of filing of a Claim of Appeal or Assignment of Errors or other appellant procedure. Deponent believed that nothing further was required to be done on his part in order to protect and assert the rights of the taxpayers existing as a class in said litigation.

15. On learning of the decision in the Michigan Supreme Court Mr. Campbell discussed the matter with Arthur E. Moore, counsel for the appellants, Cities of Pleasant Ridge and Huntington Woods, and for the first time learned of the necessity of joining in an appeal and of appellant procedure pertaining thereto. Here for the first time deponent was advised that his name should be added to appeal papers. Therefore, he obtained and secured a substitution of attorneys so that an appeal might be brought in this matter to the United States Supreme Court on his behalf, as representative of the Hazel Park Non-Partisan Taxpayers as a class.

John G. Campbell.

Subscribed and sworn to before me a Notary Public, in and for the County of Wayne, on this 18th day of October, 1947.

James B. Chaney,
Notary Public, Wayne County, Michigan.
My Commissioner expires November 5, 1948.

(Notarial Seal)

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AFFIDAVIT OF HAROLD STREET IN SUPPORT OF BRIEF OF APPELLANTS IN OPPOSITION OF MOTION TO DISMISS

(Title of Court and Cause)

State of Michigan,
County of Muskegon—ss.

Now comes Harold Street, being first duly sworn, deposes and says:

1. He is a practicing attorney, duly authorized to practice law in the State of Michigan, with offices presently in Muskegon, Michigan.

2. Deponent further states that on or about the 15th day of April 1942 he was substituted as attorney for the plaintiffs in the above entitled cause and did thereafter represent the plaintiffs, John G. Campbell and the Hazel Park Non-Partisan Taxpayers Association.

3. Deponent further states that on or about the 20th day of July, 1942 he entered the Federal Bureau of Investigation and that thereafter throughout continuance of such service, until after the termination of the last World War was unable to engage in the practice of law in any litigation whatsoever.

4. That by virtue of the premises he was unable to represent the plaintiffs John G. Campbell and Hazel Park Non-Partisan Taxpayers Association, at the hearing in the Circuit Court on January 4, 1945 or thereabouts, but that he was advised and led to believe that other counsel would be substituted in his stead or that the court would assist the plaintiffs in their own proper person, without counsel, in representing taxpayers as a class and in prop-

erly prosecuting said litigation with vigor and reasonable capacity.

5. Deponent further states that he executed this affidavit in support of the brief of appellants in the above entitled cause in opposition to the motion to dismiss appeal.

Harold M. Street.

Subscribed and sworn to before me a Notary Public in Muskegon County, Michigan, on this 13th day of October, 1947.

Harriet D. Neitring,
Notary Public, Muskegon County, Michigan.
My commission expires December 10, 1949.

(Seal)

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON PARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF APPELLEE, TOWNSHIP OF ROYAL OAK, OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GLENN C. GILLESPIE,
FRANKLIN E. MORRIS,
Counsel for Appellee,
Township of Royal Oak.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON PARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT BY APPELLEE, TOWNSHIP OF ROYAL OAK, SHOWING LACK OF JURISDICTION OF APPEAL.

Now comes appellee, Township of Royal Oak, and shows the following matters of record, which disclose that these appellants, have no right of review of the decision of the Supreme Court of Michigan in the above entitled cause, under the rules and practice of this Court:

1. *The 5th Amendment to the Constitution does not apply.*

The 5th Amendment to the Constitution of the United States, relied upon in part by appellants, was designed

exclusively as a restriction upon the exercise of Federal power, and does not apply to laws enacted by, or, proceedings had under the authority of, a State Government.

> Authorities too numerous to cite, collected under note in 1 F. C. A. commencing at page 250, and supplement No. 1 at page 179.

2. *Plaintiffs and appellants, Hazel Park Non Partisan Taxpayers Assn. and John G. Campbell, did not appear as appellants in the Supreme Court of Michigan.*

Plaintiffs and appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, as appears from the records and files in this cause, are not proper appellants in this Court for the reason that they took no appeal from a decision adverse to their present claims by the Circuit Court for the county of Oakland, in chancery, to the Supreme Court of the State of Michigan, and consequently were not parties to the decision in that court, and now have no right as appellants to appeal from the subsequent decision of that court adjudicating the claims of other appellants.

The Supreme Court of Michigan in its opinion which forms the basis of this appeal, in stating the position of the parties in that court, said in part:

> "From this decree (of the circuit court for Oakland County) the city of Pleasant Ridge appeals, and the cities of Pleasant Ridge and Huntington Woods have joined together in a cross-appeal, and the city of Royal Oak takes a separate cross-appeal. The other parties, not having sought review, must be considered as content with the decree."

3. Remaining appellants have no rights under 14th Amendment.

The remaining appellants, cities of Pleasant Ridge and Huntington Woods, being mere instrumentalities of the State of Michigan, may not invoke the protection of the 14th Amendment as against an act of the State legislature directing the levying of the tax.

The provisions of Section 1 of the 14th Amendment to the Constitution of the United States, under the well settled law, may be invoked only by citizens of the United States, and does not limit the power of a State over its political subdivisions.

Trenton v. *New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 S. C. R. 534, 29 A. L. R. 1471;

Newark v. *New Jersey*, 262 U. S. 192, 67 L. Ed. 943, 43 S. C. R. 539;

Risty v. *Chicago R. I. & P. Ry.*, 270 U. S. 378, 70 L. Ed. 641, 46 S. C. R. 236.

"The power of a state to control its own governmental agencies and political subdivisions is unrestrained by the requirements of due process of the law, and since the requirement is a limitation on the state itself, it is not available to the state, or its agencies or political subdivisions."

16 C. J. S. p. 1158.

"So far as the state and its instrumentalities are concerned, there is no scope for invoking the due process guaranty as against the action of the state itself."

12 Am. Jur. p. 288.

See also *Graves* v. *Bliss*, 235 Mich. 364, 209 N. W. 142, involving a similar statute under the drain law, where

certiorari was denied by this Court in *Bliss* v. *Graves*, 273 U. S. 724, 71 L. Ed. 859.

Respectfully submitted,

GLENN C. GILLESPIE,
1101 Pontiac State Bank Bldg.,
Pontiac, Michigan;
FRANKLIN E. MORRIS,
22,748 Woodward Avenue,
Ferndale, Michigan,
Attorneys for Defendant and
Appellee, Township of Royal Oak.

Dated at Pontiac, Michigan, this 26th day of September, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON PARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

Now Comes the Township of Royal Oak, defendant, cross-plaintiff and appellee, by Glenn C. Gillespie and Franklin E. Morris, its attorneys, and moves this Honorable Court:

1. To dismiss the writ of error heretofore issued in the above entitled cause, and, all proceedings thereunder, for the reason that no Federal question is presented by the record.

2. In case the foregoing motion is denied, to affirm the decree of the Supreme Court of Michigan for the

reason that it is final as to appellant, and the questions involved are so frivolous as to need no further argument.

This motion is based on the records and files in said cause and the statement and authorities heretofore filed in this cause by appellee showing lack of jurisdiction of this Court of said appeal.

Dated at Pontiac, Michigan, this 30th day of September, 1947.

GLENN C. GILLESPIE,
1101 Pontiac State Bank Bldg.,
Pontiac, Michigan;
FRANKLIN E. MORRIS,
22,748 Woodward Avenue,
Ferndale, Michigan,
Attorneys for Defendant,
Cross-Plaintiff and Appellee,
Township of Royal Oak.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON PARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT BY APPELLEES, EDGAR B. WHITCOMB, ANNA S. WHITCOMB AND CITY OF HIGHLAND PARK, SHOWING LACK OF JURISDICTION OF APPEAL.

Now Come appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park, and show the following matters of record, which disclose that the appellants have no right of review of the decision of the Supreme Court of Michigan in the above entitled cause under the rules and practice of this Court:

1-3. These appellees adopt and hereby incorporate by reference the statement and authorities set forth in the

statement heretofore filed herein by the appellee, Township of Royal Oak, showing lack of jurisdiction of the appeal.

4. *No substantial Federal question is presented.*

Even if the appellants have the right to appeal and possess rights which are entitled to the protection of the 14th Amendment, in the light of the prior decisions of this Court no substantial Federal question is presented and the appeal should be dismissed for want of jurisdiction.

The appellants do not contend that the Michigan Legislature lacks power to authorize the issuance of general obligations by counties and townships for improvements such as those in respect to which the bonds here in question were issued, viz., water and sewers, if it sees fit to do so. Neither do they claim that the Legislature lacked such power at the time the legislation under attack on this appeal was enacted. Having such power, the Legislature could subsequently render such obligations general obligations without running afoul of the 14th Amendment.

Charlotte Harbor Ry. v. *Welles*, 260 U. S. 8, 11;
See also *Seattle* v. *Kelleher*, 195 U. S. 351, 359.

Respectfully submitted,

LEE E. JOSLYN, JR.,
1710 Buhl Building,
Detroit 26, Michigan,
SELDEN S. DICKINSON,
800 National Bank Building,
Detroit 26, Michigan.
Attorneys for Intervening Defendants and Appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON PARTISAN TAXPAYERS ASSOCIATION, ET AL.,

Appellants,

vs.

TOWNSHIP OF ROYAL OAK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

Now Come Edgar B. Whitcomb, Anna E. Whitcomb and City of Highland Park, appellees, by Lee E. Joslyn, Jr. and Selden S. Dickinson, their attorneys, and move this Honorable Court:

1. To dismiss the writ of error heretofore issued in the above entitled cause, and all proceedings thereunder for the reason that no Federal question is presented by the record.

2. To dismiss the writ of error heretofore issued in the above entitled cause and all proceedings thereunder

for the reason that no substantial Federal question is presented by the record.

3. In case the foregoing motion is denied, to affirm the decree of the Supreme Court of Michigan for the reason that it is final as to appellant, and the questions involved are so frivolous as to need no further argument.

This motion is based on the records and files in said cause and the statement and authorities heretofore filed in this cause by appellees showing lack of jurisdiction of this Court of said appeal.

Dated at Detroit, Michigan this 9th day of October, 1947.

LEE E. JOSLYN, JR.,
1710 Buhl Building,
Detroit 26, Michigan.
SELDEN S. DICKINSON,
800 National Bank Building,
Detroit 26, Michigan.
Attorneys for Intervening Defendants and Appellees, Edgar B. Whitcomb, Anna S. Whitcomb and City of Highland Park.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, et al.,
Appellants,
vs.
TOWNSHIP OF ROYAL OAK, et al.,
Appellees

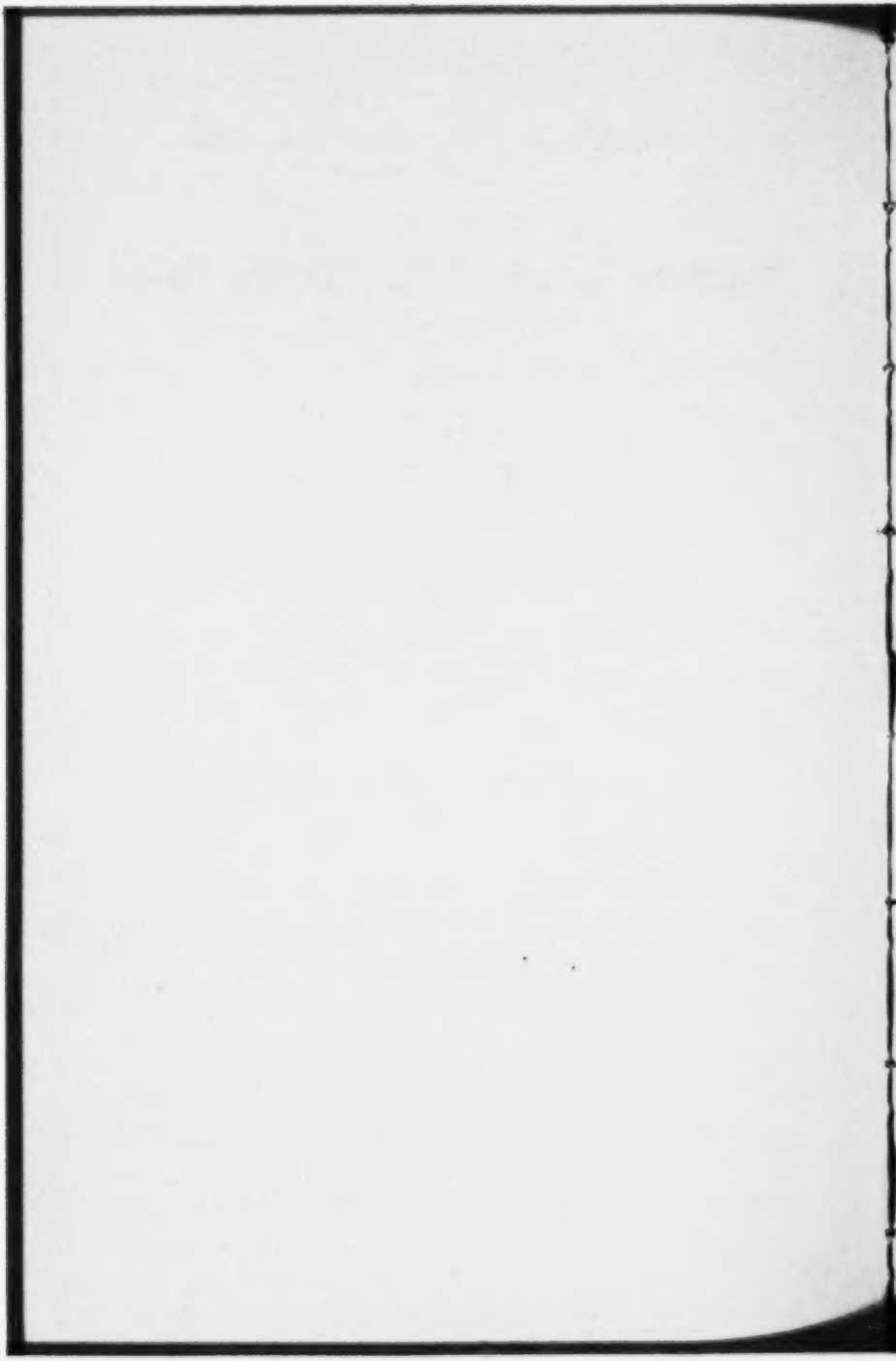
Appeal from the Supreme Court of the State of Michigan

BRIEF FOR APPELLEE, TOWNSHIP OF ROYAL OAK ON MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 413

HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION, et al.,
Appellants,
vs.
TOWNSHIP OF ROYAL OAK, et al.,
Appellees

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR APPELLEE, TOWNSHIP OF ROYAL OAK ON MOTION TO DISMISS OR AFFIRM

(As the record has not as yet been printed in this court, the references herein, unless otherwise indicated, are to the record in the state supreme court, a certified copy of which is on file in this court.)

STATEMENT OF THE CASE

(The following brief summary is taken from the opinion of the supreme court of the state of Michigan in *Hazel Park Non Partisan Taxpayers Ass'n. v. Township of Royal Oak,* 317 Mich. 607, from which this appeal was taken.)

Appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, as plaintiffs, and, the cities of Pleasant Ridge and Huntington Woods as cross-plaintiffs, filed suit in the circuit court for Oakland County in chancery to restrain appellee, Township of Royal Oak, from levying or collecting taxes on property in the township lying outside certain special assessment districts and not assessed for benefits, for the purpose of paying installments of principal and interest on certain refunding bonds issued by the township to retire defaulted special assessment bonds originally issued to pay for sewer and water mains in the special assessment districts. Subsequent to the issuing of the special assessment bonds the state legislature enacted an amendment to the bond statute which required the township, in the event at any time a special assessment fund was insufficient to pay bonds and interest, to advance the amount necessary to pay the bonds and interest, to be repaid when such assessments were collected.

The circuit court, following prior decisions of the supreme court of Michigan in *Whitman v. Township of Royal Oak,* 269 Mich. 146 and *Royal Oak v. Pleasant Ridge,* 295 Mich. 284, held that the statute creating the township liability was not unconstitutional; that the township was liable for the payment of the bonds, and, that the various cities (including appellant cities), which had previously acquired portions of the township territory by annexation or incorporation, were liable to pay their proportionate share of such liability (Supreme Court record pp. 224-234).

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Appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, took no appeal to the supreme court of Michigan from the decision of the circuit court, but the remaining appellants duly perfected appeals. The supreme court of Michigan, in *Hazel Park Non Partisan Taxpayers Ass'n. v. Township of Royal Oak,* 317 Mich. 607, affirmed the decree of the lower court holding appellant cities, which had annexed portions of its territory, liable for their proportionate shares of the bond indebtedness of the township.

Following the decision of the supreme court of Michigan, a notice of substitution of present counsel for appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, was filed in the Oakland County circuit court, and they joined with cross-plaintiff cities of Pleasant Ridge and Huntington Woods in the petition for leave to appeal to this court. Since that time another cross-plaintiff, the City of Ferndale, has filed another petition for leave to appeal, but no printed records in either case have been furnished counsel for appellee to the present time.

Counsel for appellee, Township of Royal Oak, has filed a statement alleging lack of jurisdiction of both appeals on the following grounds:

1. The 5th Amendment to the Constitution of the United States, relied upon in part by appellants, was designed exclusively as a restriction upon the exercise of Federal power, and does not apply to laws enacted by, or, proceedings had under the authority of, a state government.

2. Appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, did not join as appellants in the appeal to the supreme court of Michigan from the decree entered against them by the trial court.

3. Remaining appellants, as municipal corporations of the state of Michigan, have no rights under the 14th Amendment.

In connection with the statement showing lack of jurisdiction, appellee also filed a motion to dismiss or affirm, on the following grounds:

1. No Federal question is presented by the record.

2. The decision and decree of the supreme court of Michigan is final as to appellants, and the questions involved are frivolous.

ARGUMENT AS TO LAW

1. No authorities have been cited by appellants in support of their claims to protection under the 5th Amendment to the Constitution of the United States, and we assume, under the authorities referred to in our statement showing lack of jurisdiction, that this ground of appeal is no longer urged.

2. In appellee's statement opposing jurisdiction, it was pointed out that appellants, Hazel Park Non Partisan Taxpayers Association and John G. Campbell, did not take an appeal to the supreme court of Michigan from the decree entered against them by the trial court. The supreme court of Michigan, in disposing of the issues raised by other appellants in that court, said of the rights of these two appellants:

> "The other parties (these appellants), not having sought a review, must be considered as content with the decree."
>
> *Hazel Park Ass'n. v. Township of Royal Oak*, 317 Mich. 607, 619.

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Counsel for these two appellants have failed to point to a single authority which supports their contention that, despite their failure to appeal from the decree of the circuit court for Oakland county in chancery, after an appeal had been taken by other appellants to the supreme court of Michigan, they have a right to appeal as appellants in this court.

The rule that any party who does not appeal from an adverse judgment entered against him by a court of competent jurisdiction, is thereafter bound by the terms of such judgment, is too well settled to require citation of authorities.

3. That the remaining appellants, cities of Pleasant Ridge and Huntington Woods, being merely political subdivisions of the state, cannot invoke the protection of Sec. 1 of the 14th Amendment to defeat the right of the state of Michigan to direct the levying of the taxes in question, is clearly established by many prior decisions of this court, some of the more important of which are cited at pages 2, 3 and 4 of appellees' statement showing lack of jurisdiction. The rule established by these cases is not controverted by any of the authorities cited by appellants.

CONCLUSION

As appears from the opinions of the supreme court of Michigan in

Whitman v. Township of Royal Oak, 269 Mich. 146, and

Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284,

the liability of appellee, Township of Royal Oak, for the payment of these special assessment bonds, was firmly es-

tablished by the supreme court of Michigan more than thirteen years ago. At the same time these same constitutional questions, which appellants now raise, were adversely decided against the township. In the present action the supreme court of Michigan has merely held that appellant cities, which acquired portions of township territory through incorporation or annexation, must now pay their proportionate shares of such township liability. In addition, under the decree of the supreme court, they will also be required to account to the township for their respective shares of the payments made on the bonds from time to time by the township since the first default in payment in 1933.

We respectfully submit that appellants have not presented a case within the jurisdiction of this court and that the appeal should be dismissed.

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DECEMBER 8, 1947.

Per Curiam Decisions.

No. 413. HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. *v.* TOWNSHIP OF ROYAL OAK ET AL.; and

No. 424. CITY OF FERNDALE *v.* HAZEL PARK NON-PARTISAN TAXPAYERS ASSOCIATION ET AL. Appeals from the Supreme Court of Michigan. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Stanton G. Dondero* for appellants in No. 413. *Orph C. Holmes* and *Claude H. Stevens* for appellant in No. 424. *Glenn C. Gillespie* and *William C. Hudson* for Royal Oak,

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appellee in Nos. 413 and 424. *Lee E. Joslyn, Jr.* and *Selden S. Dickinson* for Whitcomb et al., appellees in Nos. 413 and 424. Reported below: 317 Mich. 607, 27 N. W. 2d 249.